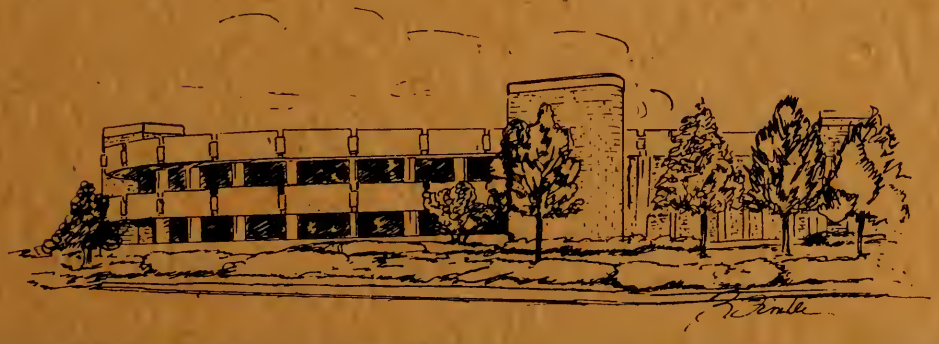
Indiana Law Review

VOLUME 16 • 1983 • NUMBER 3



Article

Notes

HERE IS A MESSAGE EVERY LAWYER USING COMPUTER RESEARCH SHOULD PONDER

Hourly rates for computer time give you only part of the cost picture. Here's how WESTLAW, with Full Text Plus, saves you money on every case search:

The editorially-prepared synopsis is the first page you see in a WESTLAW case. With this aid, you can quickly determine the relevancy of the case to your question.

Without the aid of a synopsis, you must read and study the full text of the opinion itself to determine relevancy. That can be a slow process.

In short, WESTLAW is the more efficient system because you have the choice. . . Full Text or Full Text Plus. And that saves you money on every problem searched.

Time and money-saving case synopses are just one reason many lawyers now choose WESTLAW, with Full Text Plus

For a demonstration or more information on how WESTLAW helps you win cases, contact your West Publishing Company representative, or call collect at 612/228-2433. West Publishing Company, 50 W Kellogg Blvd., P.O. Box 3526, St. Paul, MN 55165.

WESTLAW/WEST BOOKS
. . . They work together

Indiana Law Review

Volume 16 1983 Number 3

TABLE OF CONTENTS

Article

Notes

Volume 16 Summer 1983 Number 3

The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility therefor. Subscription rates: one year $15.00; foreign $18.50. Back issues are available from Fred B. Rothman & Co., 10368 W. Centennial Rd., Littleton, Co. 80127. Please notify us one month in advance of any change of address and include both old and new addresses with zip codes to ensure delivery of all issues. Send all correspondence to Editorial Assistant, Indiana Law Review, Indiana University School of Law—Indianapolis, 735 West New York Street, Indianapolis, Indiana 46202. Publication office: 735 West New York Street, Indianapolis, Indiana 46202. Second class postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, 735 West New York Street, Indianapolis, Indiana 46202.

Please enter my subscription to the INDIANA LAW REVIEW

NAME _____

ADDRESS _____

_____

_____

Enclosed is $_____ for ____ subscriptions.

Bill me for _____ subscriptions.

Mail to:

INDIANA LAW REVIEW
INDIANA UNIVERSITY
SCHOOL OF LAW—INDIANAPOLIS
735 West New York Street
Indianapolis, Indiana 46202

Subscription Rates (one year):
Regular, $15.00; Foreign, $18.50; Survey, $9.00

Indiana Law Review

Volume 16 1983

Indiana University School of Law—Indianapolis

1982-1983 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

JOHN W. RYAN, *Ph.D., President of the University*
GLENN W. IRWIN, JR., *M.D., Vice-President*
GERALD L. BEPKO, *LL.M., Dean*
G. KENT FRANDSEN, *J.D., Associate Dean for Student Affairs*
JEFFREY W. GROVE, *J.D., Associate Dean for Academic Affairs*

Faculty

THOMAS B. ALLINGTON, *Professor. B.S., University of Nebraska, 1964; J.D., 1966; LL.M., New York University, 1971.*

EDWARD P. ARCHER, *Professor. B.M.E., Rensselaer Polytechnic Institute, 1958; J.D., Georgetown University, 1962; LL.M., 1964.*

JAMES F. BAILEY, III., *Associate Professor and Director of Law Library. A.B., University of Mighigan, 1961; J.D., 1964; M.A.L.S., 1970.*

GERALD L. BEPKO, *Dean and Professor. B.S., Northern Illinois University, 1962; J.D., IIT/Chicago-Kent College of Law, 1965; LL.M., Yale University 1972.*

CLYDE HARRISON CROCKETT, *Professor. A.B., University of Texas, 1962; J.D., 1965; LL.M., University of London (The London School of Economics and Political Science), 1972.*

DEBRA A. FALENDER, *Associate Professor. A.B., Mount Holyoke College, 1979; J.D., Indiana University, 1975.*

WANDA D. FOSTER, *Assistant Professor. A.B., University of Michigan, 1973; J.D., Georgetown University, 1976.*

G. KENT FRANDSEN, *Associate Dean for Student Affairs and Associate Professor. B.S., Bradley University, 1950; J.D., Indiana University, 1965.*

DAVID A. FUNK, *Professor. A.B., College of Wooster, 1949; J.D., Case Western Reserve University, 1951; M.A., The Ohio State University 1968; LL.M., Case Western Reserve University, 1972; LL.M., Columbia University, 1973.*

PAUL J. GALANTI, *Professor. A.B., Bowdoin College, 1960; J.D., University of Chicago, 1963.*

HELEN P. GARFIELD, *Professor. B.S.J., Northwestern University, 1945; J.D., University of Colorado, 1967.*

HAROLD GREENBERG, *Associate Professor. A.B., Temple University, 1959; J.D., University of Pennsylvania, 1962.*

JEFFREY W. GROVE, *Associate Dean for Academic Affairs and Professor, A.B., Juniata College, 1965; J.D., George Washington University, 1969.*

WILLIAM F. HARVEY, *Carl M. Gray Professor of Law. A.B., University of Missouri, 1954; J.D., Georgetown University, 1959; LL.M., 1961.*

W. WILLIAM HODES, *Associate Professor. A.B., Harvard College, 1966; J.D., Rutgers, Newark, 1969.*

LAWRENCE A. JEGEN, III., *Thomas F. Sheehan Professor of Tax Law and Policy, 1982. A.B., Beloit College, 1956; J.D., The University of Michigan 1959; M.B.A., 1960; LL.M., New York University, 1963.*

HENRY C. KARLSON, *Associate Professor. A.B., University of Illinois, 1965; J.D., 1968; LL.M., 1977.*

WILLIAM ANDREW KERR, *Professor. A.B., West Virginia University, 1955; J.D., 1957; LL.M., Harvard University, 1958; B.D., Duke University, 1968.*

WALTER W. KRIEGER, *Associate Professor. A.B., Bellarmine College, 1959; J.D., University of Louisville, 1962; LL.M., George Washington University, 1969.*

DAVID P. LEONARD, *Assistant Professor. B.A., University of California at San Diego, 1974; J.D., UCLA School of Law, 1977.*

WILLIAM E. MARSH, *Professor. B.S., University of Nebraska, 1965; J.D., 1958.*

SUSANAH M. MEAD, *Assistant Professor. B.A., Smith College, 1969; J.D., Indiana University, 1976.*

MARY H. MITCHELL, *Assistant Professor. A.B., Butler University, 1975; J.D., Cornell Law School, 1978.*

Rita M. Novak, *Assistant Professor. B.A., Albion College, 1972; J.D., De Paul University, 1978; LL.M., Columbia University, 1981.*

Melvin C. Poland, *Cleon H. Foust Professor of Law, 1982. B.S., Kansas State University, 1940 LL.B., Washburn University, 1949; LL.M., The University of Michigan, 1950.*

Ronald W. Polston, *Professor. B.S., Eastern Illinois University, 1953; LL.B., University of Illinois, 1958.*

Bryan M. Schneider, *Assistant Professor. B.A., Amherst College, 1973; J.D., University of South Carolina School of Law, 1976; LL.M., Yale Law School, 1980.*

Kenneth M. Stroud, *Professor. A.B., Indiana University, 1958; J.D., 1961.*

Bradley J. Toben, *Assistant Professor. B.A., University of Missouri, 1974; J.D., Baylor University School of Law, 1977; LL.M., Harvard Law School 1981.*

James W. Torke, *Professor. B.S., University of Wisconsin, 1963; J.D., 1968.*

James Patrick White, *Professor (on special assignment). A.B., University of Iowa, 1953; J.D., 1956; LL.M., George Washington University, 1959.*

Lawrence P. Wilkins, *Professor. B.A., The Ohio State University, 1968; J.D., Capital University Law School, 1973; LL.M., University of Texas School of Law, 1974.*

Harold R. Woodard, *Professorial Lecturer. B.S., Harvard University, 1933; J.D., 1936.*

William J. Woodward, *Assistant Professor. B.A., University of Pennsylvania, 1968; J.D., Rutgers-Camden, 1975.*

Emeriti

Agnes P. Barrett, *Associate Professor Emeritus. B.S., Indiana University, 1942; J.D., 1964.*

Cleon H. Foust, *Professor Emeritus. A.B., Wabash College, 1928; J.D., University of Arizona, 1933.*

John S. Grimes, *Professor Jurisprudence Emeritus. A.B., Indiana University, 1929; J.D., 1931.*

R. Bruce Townsend, *Cleon H. Foust Professor of Law Emeritus. A.B., Coe College, 1938; J.D., University of Iowa, 1940.*

Legal Writing Instructors

Pamela P. Price, *Lecturer. B.A., North Carolina State University, 1977; J.D. Valparaiso University, 1980.*

Jacklyn Leas Ringhausen, *Lecturer. A.B., Indiana University, 1976; J.D., Indiana University, 1979.*

Clark Robinson, *Lecturer. A.B., Earlham College, 1966; M.A., Southern Illinois University-Carbondale, 1968; J.D., Indiana University, 1981.*

Joan Ruhtenberg, *Lecturer. B.A., Mississippi University for Women, 1959; J.D., Indiana University, 1980.*

Law Library Staff

Wendell E. Johnting, *Technical Services Librarian. A.B., Taylor University, 1974; M.L.S., Indiana University, 1975.*

Laura Kimberly, *Acquisitions/Serials Librarian. B.A., Flordia State University, 1977; M.S., 1980.*

Constance Matts, *Associate Librarian. B.A., 1973, Case Western Reserve University; MSLS, 1974, Case Western Reserve University; MAIR, 1976, Creighton University.*

Christine L. Stevens, *Reference Librarian. A.B., Western Michigan University, 1970; M.L.S., Indiana University, 1971.*

Kathy J. Welker, *Assistant Director. A.B., Huntington College, 1969; M.L.S. Indiana University, 1972.*

Indiana Law Review

Volume 16 1983 Number 3

Appellate Procedure: Are We Playing the Game Without a Complete Set of Rules?

DAVID HAMACHER*

The chess-board is the world, the pieces are the phenomena of the universe, the rules of the game are what we call the laws of nature. The player on the other side is hidden from us. We know that his play is always fair, just, and patient. But also we know, to our cost, that he never overlooks a mistake, or makes the smallest allowance for ignorance.[1]

I. FAILING TO FOLLOW THE RULES OF THE GAME

The rigorous standard of performance espoused by Thomas Huxley is equally applicable to today's appellate practitioner in Indiana. Unfortunately, in the appellate game, not everyone is well-prepared or familiar with all of the rules nor are the appellate rules as clear as is necessary in order to play the game.

To qualify to practice law, the Indiana Supreme Court's Rules for Admission require that an attorney complete six semester hours of civil procedure.[2] The basic civil procedure course invariably focuses on trial procedure and is usually a conglomeration of state and federal rules taught in one six-credit course. Seldom is a law student required to study, or even necessarily exposed to, proper Indiana appellate procedure.[3] This deficiency in the law school curriculum might not

*Partner with the law firm of Hamacher & Hamacher, Crown Point, Indiana. B.A., Wabash College, 1966; J.D., Indiana University School of Law—Indianapolis, 1976. The author wishes to thank Bruce A. Lambka and William R. McMaster, law clerks in the firm of Hamacher & Hamacher, for their long hours of research, review, and suggestions for this article.

[1]T. HUXLEY, A LIBERAL EDUCATION; AND WHERE TO FIND IT IN LECTURES AND LAY SERMONS 58 (1910).

[2]IND. R. ADMISS. & DISCP. 13(V).

[3]In his article in the American Bar Association Journal, Associate Dean Martineau of the University of Cincinnati College of Law points out how pitifully inadequate

seem overly onerous were it not for the possibly tragic results that have been increasingly manifested in our appellate courts in recent years.[4] For example, in the recent case of *Moore v. State*,[5] the court of appeals found significant errors in appellant's brief and ordered the attorney to rebrief the case in compliance with the appellate rules. The appellate court noted the most significant errors: (1) The attorney brought up the entire record when he should have structured his praecipe to bring up only the pertinent parts of the record; (2) The attorney failed to make marginal notations on each page of the record; (3) The attorney failed to provide the originals of exhibits, such as photographs; (4) The attorney failed to provide a statement of the case with adequate citations to the record and made minor misstatements; (5) The attorney failed to provide a verbatim statement of the judgment; (6) The attorney failed to provide a statement of the facts with relevant citations to the record; (7) The attorney's statement of the facts contained argumentative material; (8) The attorney's argument section of the brief was composed primarily of bald assertions, without references to the record or any clear showing of how and why the trial court erred; and (9) Finally, one argument section contained only one citation to authority and that citation did not specify the date of the case or refer to the state or regional reporter.[6]

An indication of the basic deficiencies in the appellate rules can be observed in a comparison of the Indiana Trial Rules with the Indiana Appellate Rules. The trial rules consist of 115 rather substantial, well-stated principles that establish a fairly comprehensive guideline for the practicing trial attorney.[7] On the other hand, the appellate rules consist of twenty-one rather vague, incomplete principles that supposedly govern the workings of both the Indiana Courts

---

law school training is in appellate procedure. His indictment of the current teaching method includes Moot Court competition. Martineau, *Moot Court: Too Much Moot and Not Enough Court*, 67 A.B.A. J. 1294 (1981).

[4]*See infra* notes 16-18 and accompanying text; *see, e.g.*, Cox v. Indiana Subcontractors Ass'n, 441 N.E.2d 222, 223-24 n.1 (Ind. Ct. App. 1982); Moore v. State, 441 N.E.2d 220 (Ind. Ct. App. 1982); Morris v. State, 433 N.E.2d 74, 76-77 (Ind. Ct. App. 1982); Skagg v. State, 438 N.E.2d 301, 303 n.2 (Ind. Ct. App. 1982); Jackson, *Professional Responsibility, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 265, 273 (1983).

[5]426 N.E.2d 86 (Ind. Ct. App. 1981).

[6]*Id.* at 88-90. In regard to the proper method of citation, IND. R. APP. P. 8.2(B)(1) specifically indicates that a case should be cited as follows: Warren v. Indiana Tel. Co., (1940) 217 Ind. 93, 26 N.E.2d 399. Apparently the placement of the initial comma is of little importance because this rule is most often observed in its breach as can be seen by examining virtually any Indiana decision. Also, there is a disparity between Indiana's preferred method of citation and that of the "official" citator, *A Uniform System of Citation*, (The Harvard Law Review Association 13th ed. 1981).

[7]*See* Indiana Rules of Trial Procedure.

of Appeals and the Indiana Supreme Court and that purportedly encompass interlocutory, as well as final, appeals.[8]

A good example of this disparity can be seen by examining the rules for dismissal of a case. Trial Rule 41 meticulously describes the possible grounds and situations for a dismissal of a lawsuit and carefully lays out the procedural path to follow in obtaining such a dismissal.[9] In contrast, there is no appellate rule whatsoever concerning dismissal on appeal. Yet it is clear from Indiana case law that motions to dismiss or affirm have been granted by an appellate court after the filing of an appellant's brief, after the filing of a petition for rehearing, and after the filing of a petition for transfer.[10] From just this example, it is readily observable that the rules of the appellate game are not always discernible in the formal appellate rules.

The vagueness of the written rules, combined with the generally deficient appellate training of most attorneys, may partially explain why more than ten percent of all cases on appeal are either dismissed or significantly modified.[11] Even though the appellate courts have adopted a more lenient standard for review of appellate procedural errors in recent years,[12] procedural errors seem to appear more frequently.[13] The increasing number of procedural errors is both staggering and frightening: staggering because of what it says about the proficiency of attorneys in the appellate arena and frightening because of the resulting potential for malpractice or disciplinary actions.

In a recent address, one court of appeals' judge stated that there

---

[8]*See* Indiana Rules of Appellate Procedure.

[9]IND. R. TR. P. 41.

[10]*See, e.g.*, Steel Constr. Co. v. Rossville Alcohol & Chem. Corp., 105 Ind. App. 520, 16 N.E.2d 698 (1938) (appellate court affirmed the judgment of the trial court and the supreme court dismissed the appellant's petition for transfer because it failed to disclose that a petition for rehearing had been filed and ruled on); Ross v. Schubert, 396 N.E.2d 147 (Ind. Ct. App. 1979) (petition for rehearing dismissed due to appellee's improperly interspersing extensive argument into their petition in violation of Appellate Rule 11(A)); Warner v. Warner, 139 Ind. App. 290, 219 N.E.2d 606 (1966) (judgment affirmed).

[11]This percentage was determined as a result of the author's own research. *See infra* notes 16-18 and accompanying text.

[12]*See, e.g.*, Thompson Farms v. Corno Feed Prods., Div. of Nat'l Oats Co., 173 Ind. App. 682, 691, 366 N.E.2d 3, 9 (1977). The appellate court in this case rejected appellee's argument that appellant's appeal should be dismissed upon a technical distinction. The court noted that while prior to the enactment of Trial Rule 59 motions for a new trial were required to be worded in the precise language of the statute, no such requirement was contained within Trial Rule 59. The court held that Trial Rule 59 requires merely that the statement be "sufficiently specific to put the trial court on notice of the particular error alleged." *Id.* (citing Finch v. State, 264 Ind. 48, 338 N.E.2d 629 (1975)). Therefore, appellant's inaccurate use of the word "judgment" rather than "decision" in his motion to correct errors was not fatal to his appeal.

[13]*See infra* notes 16-18 and accompanying text; *see also* cases cited *supra* note 4.

are three keys to a successful appellate career. Essentially, these keys were "be thorough," "be brief," and "be the appellee."[14] This comment recognizes the difficult, uphill battle faced by a losing party's attorney in taking a case to the next higher court of review and obtaining a favorable decision on the merits. Unless the lower court has created new law or held against ruling precedent, the odds are so strongly in favor of the successful party below that even the most careless gambler would not bet on the loser in the lower court.

With this limited chance of success on the merits, attorneys representing the moving party can ill-afford to take any action which would increase the odds of losing. Unfortunately, in far too many cases, Indiana attorneys are not complying with the appellate rules and are failing to preserve one or more issues in appeals taken to the courts of appeals or the Indiana Supreme Court.[15] During 1980, approximately 1,245 cases from the Indiana Courts of Appeals and Indiana Supreme Court were reported in the *North Eastern Reporter, Second Series*.[16] From these reported decisions, it appears that in 131 cases, or approximately ten percent of the cases decided,[17] one or more issues were waived by the appellant, or the case was dismissed or affirmed due to an error involving the motion to correct errors, the praecipe, the record, the briefs, or subsequent petitions.[18] Obviously, there is no way to predict how many of these cases might have received more favorable treatment, from the appellant's viewpoint, without these errors.

To put these figures in their historical and conceptual framework,

---

[14]Address of the Honorable Robert H. Staton, I.C.L.E.F. Seminar on Indiana Appellate Practice (June 27, 1980).

[15]*See infra* notes 18-20 and accompanying text.

[16]This figure and the figures which follow are based on the author's review of the 1980 cases found in 398 N.E.2d through 414 N.E.2d. Because the research required scanning the text of each of the Indiana cases in those volumes, a few pertinent cases may have been missed and the figures which follow may be on the low side.

[17]This calculation does not include approximately 36 cases that were dismissed in 1980 in unpublished decisions. This figure is based on a review of records carefully maintained by Mrs. Janet Blue, Commissioner of the Indiana Court of Appeals. With these cases added to both sides of the computation, the percentage of cases in which some procedural error occurs increases to thirteen percent.

[18]This figure includes cases where the court indicated that the issue was waived but went ahead and discussed the issue in obiter dictum. It does not include cases where the court indicated that waiver was possible but that it would go ahead and decide the merits of the issue.

Interestingly, even though criminal appeals are believed to be the majority of cases filed in our appellate courts, 84 out of these 131 cases were civil cases and 47 were criminal cases. This may be due to a desire on the part of our appellate courts to provide due process by avoiding technical waivers. Of the 84 civil cases, 66 were affirmed, 5 were dismissed, 8 were affirmed in part and reversed in part, and 5 were reversed. Of the 47 criminal cases, 40 were affirmed, 2 were dismissed, 4 were affirmed in part and reversed in part, and 1 was reversed.

they should be compared with similar figures for 1921, a year when the appellate courts of Indiana were more strict in their enforcement of procedural rules.[19] In 1921, 506 cases were decided by the Indiana Courts of Appeals and the Indiana Supreme Court, and only thirty-one of these cases involved a dismissal of the case, an affirmance of the judgment, or waiver of issues due to procedural irregularities beginning with the motion for a new trial or assignment of errors, the approximate equivalent to our motion to correct errors.[20] Thus, procedural error occurred in only 6.1% of the cases in 1921. Clearly, the percentage of procedural errors occurring in the appellate courts of Indiana in 1980, during a period when those courts are attempting to decide more cases on the merits and fewer cases on the basis of procedural technicalities, has more than doubled when compared with the stricter decisions by the appellate courts of 1921. Unless the comparison of 1980 cases with the 1921 cases is atypical, there has been a disturbingly significant increase in the number of errors occurring during the appellate process, especially when the less stringent standards of our present courts are taken into account. Steps must be taken to reverse this trend and to reduce the number of outright dismissals, affirmances, or waivers occurring as a result of procedural deficiencies.

In this regard, a study of civil cases[21] was conducted to deter-

---

[19]*See, e.g.,* Continental Casualty Co. v. Novy, 397 N.E.2d 294 (Ind. Ct. App. 1980) (the court liberally construed the meaning of Indiana Trial Rule 59 in order to avoid erecting roadblocks to the consideration of meritorious appeals because far too many litigants had been denied their right to appeal in the past).

[20]These figures are based on a review of the cases decided in 1921 found in 129 N.E. 1 through 132 N.E. 748. The year 1921 was chosen somewhat arbitrarily and primarily based on the limited number of cases required for review. Because the research requires scanning the text of each of the Indiana cases in those volumes, a few pertinent cases may have been missed and the figures may be on the low side. However, it is assumed that any errors in reviewing the 1980 cases and the 1921 cases would balance each other out.

[21]*See supra* note 16. Criminal cases were also surveyed and the figures are as follows:

I.	Motion to Correct Errors	
	A. Failure to raise the issue in the motion to correct errors	11
	B. Failure to discuss with sufficient specificity	2
	C. Failure to argue the issue in the motion to correct errors	2
	D. Failure to file motion to correct errors within the time period provided	1
II.	Praecipe	
	A. Failure to file praecipe within 30 days	0
III.	Record	
	A. Failure to timely file record with court	1
	B. Failure to include the proper part of record	9
	C. Failure to provide supporting facts; where no record is made; or where there are facts outside the record	4

mine during what stage of the appellate proceedings most procedural errors occurred and what type of error was most common. For this study, the appellate process was divided into five stages: the motion to correct errors, the praecipe, the preparation and filing of the transcript, the preparation and filing of the appellant's brief, and subsequent proceedings.[22] Subclassifications were then developed to better clarify the type of procedural error occurring in each of these stages.[23] The results of this study were as follows:

Civil

I.	Motion to Correct Errors	
	A. Failure to raise the issue in the motion to correct errors	21
	B. Failure to discuss with sufficient specificity	9
	C. Failure to argue the issue in the motion to correct errors	3
	D. Failure to file the motion to correct errors within the time period provided	4
	E. Failure to properly phrase the error	3
	F. Failure to set out findings of fact and conclusions of law in the motion to correct errors	1
	D. Failure to provide a comprehensible record or one which adequately conveys the evidence; or where all exhibits can be clearly seen or understood	2
IV.	Appellant's Brief	
	A. Failure to present cogent argument or authority	18
	B. Failure to relate the law to the evidence	4
	C. Failure to set out instructions or objections in brief	4
	D. Failure to include issues asserted in motion to correct errors	2
	E. Failure to timely serve a copy of the brief	0
	F. Issues or arguments for the first time in reply brief	1
V.	Subsequent Proceedings	
	A. Issues raised for the first time in a petition for rehearing	0

[22]This is not intended to disparage the importance of the preservation of error in the trial court. If trial counsel does not know how to preserve error during the course of the litigation, prior to judgment, and does not consult with experienced appellate counsel around the time of the pre-trial conference and preparation of the trial brief on the question of error preservation, he may effectively waive most of the appealable issues before the appellate process starts.

[23]As with the previous footnotes concerning the number of cases where waiver occurred, the author cannot guarantee that all the types of waiver in each of the 131 cases have been included in this analysis. However, it is believed that most of them are included. In addition, because many cases involve more than one type of waiver due to procedural error, figures which follow in the text will not add up to the total number of cases.

II.	Praecipe	
	A. Failure to file praecipe within 30 days	3
III.	Record	
	A. Failure to timely file the record with court	0
	B. Failure to include the proper part of the record	7
	C. Failure to provide supporting facts; where no record is made; or where there are facts outside the record	3
	D. Failure to provide a comprehensible record or one which adequately conveys the evidence; or where all exhibits can be clearly seen or understood	2
IV.	Appellant's Brief	
	A. Failure to present cogent argument or authority	31
	B. Failure to relate the law to the evidence	7
	C. Failure to set out instructions or objections in the brief	1
	D. Failure to include issues asserted in motion to correct errors	2
	E. Failure to timely serve a copy of the brief	0
	F. Failure to raise an issue prior to the reply brief	2
V.	Subsequent Proceedings	
	A. Failure to raise an issue prior to the petition for rehearing	2

The results of this study, unless the cases decided in 1980 were unusual, indicate that the adoption of a "tickler system" or better reminder system is not going to have a significant impact on the number of waivers, dismissals, or affirmances on appeal. Time limits are not the primary problem. Rather, most of the errors occur in the preparation of the motion to correct errors and the brief.[24]

Based upon these statistics, it is clear that not all of the blame for increased procedural errors can be laid at the doorsteps of our law schools and of our rule-writing authorities. The most significant number of procedural errors would suggest that the appellate attorneys simply failed to diligently research the questions involved or to painstakingly set out the errors alleged and the supporting

---

[24]The fact that there is very little disparity in the number of errors occurring in the motion to correct errors and in the brief in civil cases, but a significant disparity in these same areas in criminal cases, *see supra* note 21, may be the result of the provision for a belated motion to correct errors in the criminal appeal that allows a criminal appellate attorney a second chance at the preservation of error.

arguments and authorities.[25] Thus, although a better educational method for instructing on appellate advocacy and a more complete set of appellate rules would be beneficial, these alone will not remedy the primary reasons for appellate procedural error.

These procedural errors may also pose a significant threat to appellate practitioners. Indiana courts have consistently required that attorneys be aware of the rules and principles of law declared in adjudged cases that have been duly reported.[26] A recent case stated in dictum that "good appellate advocacy" requires and, further, demands the regular reading of the advance sheets.[27] Thus, a malpractice action, based upon a failure to comply with procedural technicalities, is a very real possibility. In addition, failure to adequately perfect an appeal, after filing a motion to correct errors, has been held to constitute a basis for a disciplinary action.[28] Clearly, it behooves all attorneys involved in appeals to be fully aware of the procedural requirements set out in both the appellate rules and case law. Not only is the client's interest in jeopardy as a result of procedural errors but possibly the attorney's livelihood or financial well-being as well.

Having examined the types of procedural problems experienced by Indiana attorneys in taking appeals, the remaining portions of this article will attempt to provide some practical suggestions to the appellate practitioner.[29] First, there are practical suggestions for the ap-

---

[25]Admittedly, some of the waivers in the brief, resulting from a failure to present cogent argument and authority, may have been the result of an intentional decision by appellant's attorney not to raise an issue due to questions about its strength or wisdom. However, the author doubts that this is often the case.

Moreover, these figures are only the tip of the iceberg. While it is outside the scope of this article, waiver of issues can also result from procedural errors occurring during the trial. Issues can be waived, for example, by failing to properly plead. Far from being a rare occurrence, a significant number of Indiana attorneys in their representation of appellants, or potential appellants, have made an extremely difficult challenge even more rigorous by failing to properly preserve error during either the trial or the appellate process.

[26]*See, e.g.*, Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 146, 23 N.E. 1075, 1075 (1890).

[27]Boss-Harrison Hotel Co. v. Barnard, 148 Ind. App. 406, 408, 266 N.E.2d 810, 811 (1971).

[28]*E.g., In re* Davis, 429 N.E.2d 938, 941 (Ind. 1982).

[29]The author feels compelled to add a disclaimer. It is doubtful that any article no matter how lengthy and well researched will be able to set out all of the potential areas for waiver or dismissal. Thus, the material included in the remainder of this article may not be exhaustive. However, in researching this article a serious attempt has been made to find as many of the potential procedural problems as possible. In fact, in order to avoid leaving out any material, some of the older cases discussed herein may no longer be the basis for a waiver or dismissal, but it would appear to be better to err on the side of caution. Moreover, while these older cases may no longer provide a basis for waiver or dismissal under the purportedly more liberal

pellate attorney pursuing a decision in a higher court, and, then there are suggested steps that opposing counsel could take to turn the other party's mistakes to his client's benefit.

II. The Rules of the Game for the Moving Party

A. Extension of Time

Before dealing with the specific stages of the appellate process, a few comments would appear appropriate concerning a procedure that permeates the entire process—requests for an extension of time. The availability of an extension of time varies depending on the specific stage of the appellate process. Trial Rule 6 provides that an extension of time is not available for a motion to correct errors under Trial Rule 59(C).[30] Although Trial Rule 6 does not discuss a statement in opposition to the motion to correct errors pursuant to Trial Rule 59(E) and would therefore appear to allow for an extension, that question apparently has not been decided by an Indiana court.

Under the appellate rules, Appellate Rule 14(A) prevents an extension of time for petitions for rehearing and transfer and for any briefs connected with those petitions.[31] Although there is no clear statement in the Indiana Appellate Rules about the praecipe, it does not appear that an extension of time is available for filing the praecipe.[32] An extension of time for filing most other appellate papers is available.[33]

In seeking to obtain an extension of time, the petition for extension of time must be verified and must disclose facts establishing, to the satisfaction of the court, that the time allowed will not suffice and that the attorney has been diligent.[34] The normal requirement is that the petition must be filed at least five days before the expira-

---

standard of review employed by our current courts, few of them have been specifically overruled, and, in any case, they are probably still instructive on better practice. Finally, it bears repeating that the scope of this article does not encompass the multitude of ways that trial counsel can waive an issue during the course of trial litigation and prior to the motion to correct errors. An excellent discussion of these potential areas for waiver can be found in 4A B. Bagni, L. Giddings & K. Stroud, Indiana Practice §§ 11-18 (1979 & Supp. 1982), and in 1 A. Bobbitt, Indiana Appellate Practice and Procedure 8-305 (1972 & Supp. 1982).

[30]Ind. R. Tr. P. 6(B)(2).

[31]Ind. R. App. P. 14(A).

[32]Ind. R. App. P. 14(A), (B). *But see* Soft Water Util., Inc. v. Le Fevre, 261 Ind. 260, 269, 301 N.E.2d 745, 750 (1973) (declaring that an appeal is not forfeited ipso facto when no praecipe is filed within the required 30 days).

[33]Ind. R. App. P. 14(A). An extension of time is not available for briefs appealing awards of the Industrial Board. Ind. R. App. P. 14(F).

[34]Ind. R. App. P. 14(A).

tion of the time sought to be extended;[35] however, the appellate rule also provides for an emergency extension of time if an affidavit is filed showing that the facts constituting the basis of the petition did not exist previously or were not then known to the applicant or his counsel.[36]

Finally, Appellate Rule 14(D) provides that notice of the application and a copy of the petition for extension of time shall be served on the opposing party or his counsel.[37] In at least one case, a failure to serve opposing counsel formed part of the basis for a dismissal of the appeal.[38]

B. The Motion to Correct Errors

For an appellate practitioner intent on avoiding the waiver of issues through procedural technicalities, probably no stage of the appellate process is more important than the preparation and filing of a motion to correct errors. Although each stage of the appellate process involves some potential for procedural error, the motion to correct errors, which frames the issues on appeal, is probably the least subject to correction by leave of court, and, statistically, error at this stage is one of the most significant reasons for waiver, dismissal of the appeal, or affirmance of the trial court's decision.[39]

The motion to correct errors has been referred to as the complaint for purposes of appeal.[40] This analogy, although apt in that both frame the issues, may be somewhat misleading to counsel admitted to the bar after 1970.[41] A motion to correct errors is dissimilar to a complaint in two respects. First, unlike a complaint, the concept of notice pleading is not applicable to a motion to correct errors. Second, there is an extremely limited opportunity for amending the motion to correct errors, which can only be found by reviewing Indiana case law.[42]

---

[35]*Id.*

[36]*Id.*

[37]IND. R. APP. P. 14(D).

[38]Barker v. Hammett, 139 Ind. App. 279, 281, 219 N.E.2d 438, 440 (1966).

[39]*See supra* notes 24-25 and accompanying text.

[40]Ralston v. State, 412 N.E.2d 239 (Ind. Ct. App. 1980); *see also* State v. Normandy Farms, 413 N.E.2d 268 (Ind. Ct. App. 1980) (motion to correct error required to frame issues on appeal).

[41]*See* 4A B. BAGNI, L. GIDDINGS & K. STROUD, INDIANA PRACTICE § 321 (1979 & Supp. 1982). The Indiana Rules of Court were adopted in 1970.

[42]While a motion to correct errors can probably be amended during the 60-day period following judgment, it clearly cannot be amended or supplemented after that period has expired. For support that a motion to correct errors can be amended or supplemented within the 60-day period, see Ver Hulst v. Hoffman, 153 Ind. App. 64, 286 N.E.2d 214 (1972). For support that it cannot be supplemented or amended after the 60-day period, see Martin v. State, 236 Ind. 524, 141 N.E.2d 107, *cert. denied*, 354

Both dissimilarities emphasize the necessity of devoting a substantial period of time to the preparation of the motion to correct errors. The sixty-day period provided for filing a motion to correct errors should be devoted to completing the research on all issues to be raised on appeal, to the marshalling of facts, to obtaining the transcript, and to the painstaking phrasing of the errors to be raised.

Because the motion to correct errors must be filed within sixty days of the entry of judgment and there is no possibility of an extension of time,[43] the first step in preparing a motion to correct errors is computing the date on which the motion must be filed with the court. Although this would appear to be merely a matter of computation, recent Indiana cases have indicated some problems that appellate practitioners are having, both in obtaining a timely notification of the rendering of a judgment, and in determining the date on which the judgment was rendered.

In *Brendonwood Common v. Kahlenbeck*,[44] neither party was notified of the entry of judgment until after the time for filing a motion to correct errors had expired. Shortly after discovering that the judgment had been entered, appellant moved to vacate and for a re-entry of the judgment to permit the filing of a timely motion to correct errors. That motion was denied and an appeal ensued. Although the court of appeals found precedent for a trial court to permit a party to perfect his appeal where the party has not been notified of the entry of judgment, the appellate court also found that it was not an abuse of discretion for the trial court to refuse to act where the party failed to show the exercise of due diligence in determining the status of his case.[45] Thus, it is apparent that appellate practitioners cannot rely on the clerk of the court to notify them of the entry of judgment, but must take steps to keep apprised of whether, and when, a judgment has been entered. As Judge Sullivan pointed out in his dissenting opinion in *Brendonwood Common*, these steps apparently must now include a daily check of the court's records.[46]

In *Warriner v. State*,[47] appellants sought to appeal a judgment of the Marion County Criminal Court affirming a judgment of the Marion County Municipal Court. Appellants contended that the sixty-day period for filing a motion to correct errors began on the date

---

U.S. 927 (1957) and Smith v. First Nat'l Bank of Hartford City, 104 Ind. App. 299, 11 N.E.2d 58 (1937). For additional authority supporting both propositions, see 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE at 127 (1971) and 4A B. BAGNI, L. GIDDINGS & K. STROUD, INDIANA PRACTICE § 23, at 51 (1979 & Supp. 1982).

[43]IND. R. TR. P. 59(C).

[44]416 N.E.2d 1335 (Ind. Ct. App. 1981).

[45]*Id.* at 1336-37.

[46]*Id.* at 1338 (Sullivan, J., dissenting).

[47]413 N.E.2d 638 (Ind. Ct. App. 1980).

that the trial court judgment was executed. The court of appeals disagreed and found that under Trial Rule 59(C), the sixty-day period began on the date the judgment appealed from was entered.[48] Because appellant's motion to correct errors was not filed within sixty days of the date judgment was entered, the appeal was dismissed.[49]

After determining the last date for filing, appellate counsel is now ready to begin the preparation of the motion to correct errors.[50] Actually, the preparation of a motion to correct errors involves the preparation of two separate documents or two parts of one document. Trial Rule 59(D)(2) requires that counsel provide the trial court with a statement of facts and grounds upon which the errors are based, in addition to the statement of the alleged errors. Moreover, failure to provide both the statement of the errors and the statement of facts and grounds supporting the errors can constitute a basis for dismissal.[51] Thus, both the statement of errors and the statement of facts and grounds in support of the errors must be filed with the court within sixty days in order to preserve any error for purposes of appeal.

In preparing the statement of errors, appellate counsel is required to present those errors in a clear, concise, and legally accurate manner.[52] Because the concept of a motion to correct errors is to provide the trial court with an opportunity to correct any mistakes made during the course of the litigation, the Indiana appellate courts generally have held that, in the appeal, they will consider only those questions that were raised before the trial court.[53] Thus, the motion to correct errors must include all issues sought to be raised on appeal and state them clearly and concisely.

There is an additional requirement for the statement of errors in that the statement of errors must be legally accurate; that is, the language used to describe the errors must conform with legal precedent. Several recent cases serve as examples to clarify this concept. In *Menze v. Clark*,[54] a statement that a negative judgment was not

---

[48]*Id.* at 639.

[49]*Id.*

[50]Previous to this, counsel should have prepared an initial list of potential errors, researched Indiana case law on those errors including any steps necessary for the preservation of error at the trial court level, and reviewed the pleadings and transcript.

[51]Lafary v. State Farm Mut. Ins. Co., 166 Ind. App. 279, 335 N.E.2d 242 (1975).

[52]*See* Le Reau v. Teibel, 127 Ind. App. 920, 138 N.E.2d 153 (1956); *see also* Wireman v. Wireman, 168 Ind. App. 295, 343 N.E.2d 292 (1976).

[53]*See, e.g.*, Indiana Motorcycle Ass'n v. Hudson, 399 N.E.2d 775, 777 (Ind. Ct. App. 1980) (issue deemed waived due to failure to raise it in motion to correct errors); Spears v. Jackson, 398 N.E.2d 718, 719 (Ind. Ct. App. 1980) (issue deemed waived due to failure to raise it in motion to correct errors); Macken v. City of Evansville, 173 Ind. App. 60, 362 N.E.2d 202 (1977) (failure to clearly state error); Sacks v. State, 172 Ind. App. 185, 360 N.E.2d 21 (1977) (failure to clearly state error).

[54]142 Ind. App. 385, 235 N.E.2d 69 (1968).

supported by the evidence raised no error on appeal because a negative judgment can only be challenged as being contrary to law.[55] Likewise, in *Registration and Management Corp. v. City of Hammond*,[56] a statement of error alleging that a finding of fact was contrary to law presented no question for review because any specification of error concerning findings of fact, other than an allegation that the finding of fact is not supported by sufficient evidence, presents no question for review.[57] A failure to challenge all of the findings of fact *may* result in a waiver of all issues involving the findings of fact as was done in *Vogelgesang v. Shackelford*.[58] In *Merryman v. Price*,[59] the court concluded that specifications of error concerning conclusions of law, other than the specification that conclusions of law are not supported by the findings of fact, are waived.

Finally, in preparing the statement of errors, each alleged basis for error should be stated separately and not combined with any other basis for error. Not only is this required by Trial Rule 59(D)(2), but there is also at least one Indiana case holding that where there is a joint assignment of errors and the appellate court determines that one of them is not error, then the remaining errors in that joint assignment are deemed waived.[60] Although the third district of the court of appeals has subsequently rejected this "joint assignment rule" in a footnote,[61] careful practitioners will want to avoid this possible basis for waiver.

It is also apparent that an equal degree of care needs to be taken in the preparation of the statement of facts and grounds in support of the errors. Since the advent of this document as part of a motion to correct errors, many attorneys have envisioned the statement of facts and grounds as purely an argumentative document seeking to persuade the trial court that error has occurred. However, at least one recent Indiana case suggests that the title of the pleading should be viewed more literally. In *Floyd v. Jay County Rural Electric Membership Corp.*,[62] the court found most of the issues waived, due in part to an argumentative and incomplete recital of the facts in the statement of facts and grounds in support of the motion to correct errors.[63] This would appear to suggest that each motion to correct

---

[55]*Id.* at 387, 235 N.E.2d at 71.

[56]151 Ind. App. 471, 280 N.E.2d 327 (1972).

[57]*Id.* at 476, 280 N.E.2d at 330.

[58]146 Ind. App. 248, 254 N.E.2d 205 (1970); *see also* Hunter v. Milhous, 159 Ind. App. 105, 305 N.E.2d 448 (1974).

[59]147 Ind. App. 295, 304, 259 N.E.2d 883, 888 (1970).

[60]State *ex rel.* Johnson v. Boyd, 217 Ind. 348, 361, 28 N.E.2d 256, 262 (1940).

[61]Thompson Farms v. Corno Feed Prods., Div. of Nat'l Oats Co., 173 Ind. App. 682, 692 n.3, 366 N.E.2d 3, 9 n.3 (1977).

[62]405 N.E.2d 630 (Ind. Ct. App. 1980).

[63]*Id.* at 634.

errors should be accompanied by a separate, complete, and nonargumentative statement of the facts followed by a separate argument section, similar to those sections of the brief. If this is an accurate interpretation of the decision, it may be wise for all appellants' counsel to begin structuring their statement of facts and grounds according to the divisions discussed above or face the potential of a dismissal or waiver of issues at a subsequent stage of the appellate process. The use of this organization will also provide appellants' counsel with an opportunity to have an initial view of the statement of facts and the argument sections of the brief, prior to their presentation to the appellate court. It may also provide the attorney with some ideas of how the opposing counsel will react to these sections, if opposing counsel chooses to file a statement in opposition to the motion to correct errors.[64]

Along with the problems that may arise if the statement of facts and grounds is not structured in the manner discussed above, a number of other procedural deficiencies can occur in the preparation of a motion to correct errors and a statement of facts and grounds. One such procedural deficiency occurred in *Forth v. Forth*,[65] where the appellant's motion to correct errors failed to set out findings of fact, conclusions of law, or the judgment. Although the *Forth* court noted that these failures can result in waiver, the court may consider the issue on the merits.[66] A failure to set out evidence, objections to the evidence, and the trial court's ruling on the objections may result in a waiver of such issues.[67] Another procedural deficiency which may result in issues being waived was exemplified in *Shepler v. State*.[68] In *Shepler*, the objections raised at trial to the introduction of evidence were not the same as those raised in the motion to correct errors.[69] Lastly, issues may be waived on appeal if the alleged errors are only supported by bald assertions rather than with cogent argument and authority.[70]

It may be said that the procedural errors occurring in the statement of facts and grounds relate either to a failure on the part of counsel to fully remind the court of the facts and proceedings sur-

---

[64]Concerning opposing counsel filing a motion in opposition to the motion to correct errors, see IND. R. TR. P. 59(E).

[65]409 N.E.2d 1107, 1110-11 (Ind. Ct. App. 1980).

[66]*Id.* at 1111.

[67]*See* Topper v. Dunn, 132 Ind. App. 306, 317, 177 N.E.2d 382, 388 (1961), *cited for the same proposition in* Gemmer v. Anthony Wayne Bank, 391 N.E.2d 1185, 1188 (Ind. Ct. App. 1979).

[68]412 N.E.2d 62 (Ind. 1980).

[69]*Id.* at 68.

[70]*See* Indiana Dep't of Pub. Welfare v. Rynard, 403 N.E.2d 1110, 1112-13 (Ind. Ct. App. 1980).

rounding the particular problem under consideration or to a failure to provide the court with cogent argument and authority in support of the moving party's position. Because our appellate courts perceive a motion to correct errors as providing the trial court with an opportunity to correct its own error prior to appeal, failures of these types certainly present a reasonable basis for rejecting the alleged error on appeal.

Having prepared an adequate motion to correct errors and statement of facts and grounds and having been denied relief by the trial court, counsel for the moving party is now ready to initiate the formal appellate process.

C. The Praecipe

The procedural errors occurring in the praecipe stage of the appellate process have been primarily of two types. The first of these types of error involves a failure to file the praecipe within thirty days of the denial of the motion to correct errors as required by Appellate Rule 2.[71] Somewhat related, a failure to provide notice to the court reporter may constitute a procedural error if that is the cause for failing to obtain the transcript within the time allotted.[72]

The other problem, generally occurring in the praecipe stage of the appellate process, involves a failure to request essential parts of the record. Until recently, such an error would result in a waiver of the issues relating to these omitted parts of the record.[73] However, it appears this precedent is overruled by the amendment to Appellate Rule 7.2 which now removes this type of error as grounds for dismissal or waiver of the issues.[74]

---

[71]Failure to file the praecipe within the required 30-day period does not result in an automatic forfeiture; the court will consider whether the party received due process. *See* Soft Water Util., Inc. v. Le Fevre, 261 Ind. 260, 269, 301 N.E.2d 745, 750 (1973); *see also* Kelsey v. Nagy, 410 N.E.2d 1333, 1334-35 (Ind. Ct. App. 1980).

[72]As to the question of failing to provide notice to the court reporter, counsel is advised to give notice on the same date that the praecipe is filed with the clerk's office and to maintain a record of that action because it may be necessary to request a continuance for the preparation of the transcript and counsel will need to show due diligence and that the failure to obtain the transcript within the time alloted is not his fault. *See* IND. R. APP. P. 14(A), (B).

As to the nature of the problems which can arise in computing the 30-day period for filing a praecipe, these are very similar to those involved in filing the motion to correct errors. *See supra* notes 42-48 and accompanying text.

[73]*See, e.g.*, Kranda v. Houser-Norborg Medical Corp., 419 N.E.2d 1024, 1039 (Ind. Ct. App. 1981).

[74]In the amendment to Appellate Rule 7.2 by the Indiana Supreme Court on January 1, 1982, subsection (C) states that "[i]ncompleteness or inadequacy of the record shall not constitute a ground for dismissal of the appeal or preclude review on the merits." IND. R. APP. P. 7.2(C).

In addition to this recent amendment, there is another new twist for determining what portions of the record should be requested. Under the former appellate rule, to avoid the problem of waiver the attorney would merely request a full copy of the record. Although ordering a full record provides a very simple solution for appellate practitioners, this solution has not always been happily accepted by the appellate courts. On a practical basis, the obvious result of a request by most appellate practitioners for a full copy of the record is to increase the mass of material presented to appellate courts in each appellate case. In the recent case of *Moore v. State*,[75] the Fourth District Court of Appeals strongly condemned the practice of requesting a full transcript and cited appellate practitioners to Appellate Rule 7.2(B) for the proposition that it is the duty of the appellate practitioner to scrutinize the issues to be raised and to tailor the praecipe to those issues so that only the relevant portions of the record are submitted.[76]

Although the *Moore* court did not dismiss the appeal based upon a failure to tailor the record to the issues, future appellate courts might be expected to continue public censure of attorneys who unnecessarily bring up the entire record or to return the record to appellant's attorney with instructions to revise it. Even though this may require a substantially greater amount of time in determining exactly how much of the record needs to be brought up to adequately support each issue, it is certainly a better practice for the appellate practitioner to tailor his record to the issues involved in the appeal.

D. The Pre-Appeal Conference

On July 1, 1982, the court of appeals initiated the practice of conducting pre-appeal conferences in selected appeals.[77] The criterion for holding such a conference at present seems to be the susceptibility of the case for settlement.[78] One judge from each of the districts has

---

[75]426 N.E.2d 86 (Ind. Ct. App. 1981).

[76]*Id.* at 87-88.

[77]The original amendment made the pre-appeal conference applicable to both the courts of appeals and the Indiana Supreme Court. Indiana Supreme Court's Order Amending Rules of Appellate Procedure filed with the Clerk of the Indiana Supreme and Court of Appeals on May 10, 1982, at 1-2 (copies of this can be found in *In the Supreme Court of Indiana, In the Matter of the Adoption of Rules of Appellate Procedure*, XXVI RES GESTAE 14 (July 1982)). On June 23, a subsequent amendment limited pre-appeal conferences to the courts of appeals only. Indiana Supreme Court's Order Amending Rules of Appellate Procedure filed with the Clerk of the Indiana Supreme and Court of Appeals on June 23, 1982, at 1-2 (the amended rule can be found in *In the Supreme Court of Indiana, In the Matter of Adoption of Rules of Appellate Procedure*, XXVI RES GESTAE 56 (August 1982)).

[78]Interview in 1982 with Judge James B. Young of the Indiana Court of Appeals, Fourth District, immediately following a pre-appeal conference.

been selected to hold these pre-appeal conferences. The judge presiding at the conference will not be one of those deciding the appeal and will not discuss the merits of the case with any of the three judges who do decide the appeal.[79] The procedure used in the conference will vary depending upon the judge. For instance, Judge Buchanan, in at least some of his pre-appeal conferences, has held a separate conference with each side of the appeal rather than meeting with all of the attorneys at one time.[80] Judge Young, on the other hand, always meets with all of the attorneys at the same time.[81]

The pre-appeal conference rule, Appellate Rule 2(C), requires the appellant to file with the clerk of the court of appeals, within ten days after the praecipe is filed, a copy of the praecipe, a copy of the motion to correct errors and the ruling thereon, a statement of the nature of the case, a copy of the judgment entered, and, in criminal cases, a statement of whether the defendant is at liberty on bond or is incarcerated, naming the particular institution.[82] After these materials are filed with the clerk in Indianapolis, the court will set a date for a pre-appeal conference if it deems it advisable, and notice will be sent to all the attorneys. On the basis of limited personal experience, the date for the pre-appeal conference appears to be about forty-five days after the praecipe and other material are filed in the court of appeals.

In the pre-appeal conference, issues are simplified for presentation on appeal. Also discussed is the possibility of an agreement to stipulate facts or other matters which will avoid the preparation and certification of an unnecessary record or part of the record and a determination and designation of what record from the trial court is necessary to properly present the issues on appeal. Dates will be designated upon which actions are to be taken in the submission of the appeal, which shall include, but not be limited to, the dates upon which the record and briefs must be filed. The possibility of settlement will be explored and any other matters will be discussed that may aid in the disposition of the appeal.[83] As part of the pre-appeal conference, the judge may check to be certain that all of the time requirements, up to the

---

[79]*Id.*

[80]*See* Carroll, *New Rules Help in Speeding Appeals*, The Gary Post Tribune, July 13, 1982, § A, at 3, col. 3.

[81]*See supra* note 78.

[82]IND. R. APP. P. 2(C). Sample forms to use in connection with Appellate Rule 2(C) are available in the office of the Clerk of the Indiana Supreme and Court of Appeals and the office of the Administrator of the Indiana Court of Appeals. A copy of the sample form is reproduced in XXVI RES GESTAE 479 (April 1983).

[83]IND. R. APP. P. 2(C). Indiana Supreme Court's Order Amending Rules of Appellate Procedure, filed with the Clerk of the Indiana Supreme Court of Appeals on June 23, 1982, at 1-2.

date of the pre-appeal conference, have been met; he may also set a date for the filing of the record of the proceedings and, possibly, the briefs.[84] If nothing else, this should help to avoid procedural errors involving the timeliness of actions, as well as avoiding the embarrassment of a written opinion showing a dismissal of an appeal based on procedural errors. The attorneys are expected to come to the pre-appeal conference prepared for a potential discussion of settlement.[85] Sanctions are discussed in the appellate rule, should an attorney fail to appear or be unprepared.[86]

The pre-appeal conference is very similar to a pre-trial conference. Like a pre-trial conference, its value will depend on the attitude of the participants, the preparedness of the participants, and the flexibility of the parties and their attorneys. As with a pre-trial conference, some pre-appeal conferences will develop into debating contests on the merits of the case while others will be considerably more productive. In a pilot project conducted by the Indiana Court of Appeals prior to the amendment, approximately twenty-five percent of the cases were settled.[87] If this same percentage of settlements occurs under the appellate rule, the pre-appeal conference will certainly have a beneficial effect on the caseload of the courts and should, for at least a period of time, reduce the waiting time for appellate decisions.

There are, however, some unresolved legal problems with the conference rule, both as it presently exists and in relationship to other appellate rules. First, the rule does not indicate what sanctions the court might use when an appellant fails to file or is late in filing the required material with the clerk of the court of appeals.[88] The second problem, which is to some degree related to the first, involves a current conflict between the rules. Appellate Rule 3 currently provides that the court of appeals or Indiana Supreme Court does not obtain jurisdiction of a case until the transcript is filed.[89] This provision raises some questions concerning the pre-appeal conference such as what sanctions the court could enforce concerning the failure to file the praecipe and other materials with the clerk of the court of appeals when it does not have jurisdiction of the case, and what sanctions the court could enforce concerning a failure to appear at the pre-appeal conference or to be prepared at the pre-appeal conference when the

---

[84]IND. R. APP. P. 2(C).

[85]*Id.*

[86]*Id.*

[87]*See* Carroll, *supra* note 80, § A, at 3, col. 3.

[88]IND. R. APP. P. 2(C). Indiana Supreme Court's Order Amending Rules of Appellate Procedure filed with the Clerk of the Indiana Supreme and Court of Appeals on June 23, 1982, at 1-2.

[89]IND. R. APP. P. 3(A).

court does not have jurisdiction of the case. There is a substantial question as to the enforceability of any order or sanction when the court issuing that order, or imposing that sanction, knows that it does not have subject matter jurisdiction.[90]

E. The Transcript

In its adoption in 1982 of the provision denying a dismissal of the appeal or preclusion of review on the merits based on incompleteness or inadequacy of the record, the Indiana Supreme Court may have effectively overruled precedent for dismissing cases or holding that issues had been waived due to procedural irregularities in the preparation of the record.[91] However, it is still possible that the results of the failure to comply with the dictates of prior cases may be harmful to the appellate practitioner.

It is possible to conceive of two direct consequences of a failure to adequately prepare the record in accord with the appellate rules and interpretive case law. First, and somewhat obviously, a poorly prepared record reflects badly upon the appellate advocate and creates a negative perceptual framework in the minds of the judges assigned to review the case on appeal. This result is undesirable for the appellant's counsel who is already attempting to overcome an extremely strong presumption in favor of the appellee and the determination of the trial court. The second potential result could be even more disastrous. Although Appellate Rule 7.2(C) appears to state that a dismissal or waiver of the issue cannot result from an inadequate or incomplete transcript,[92] it would certainly allow the particular court to return the transcript to the appellant's attorney with instructions to revise it in accordance with the appellate rules.[93] Moreover, the court could couple this order with a denial of an extension of time for filing the appellant's brief. Failure to comply with that order or to correct an omission, when called to the appellant's attention, could still result in waiver.[94] Even if complied with, such an order would

---

[90]*See Ex parte* Perkins, 29 F. 900 (7th Cir. 1887); *see also*, 21 C.J.S. *Courts* § 116 (1978); 17 C.J.S. *Contempt* § 64 (1974).

[91]*See, e.g.*, Jackson v. State, 241 Ind. 700, 169 N.E.2d 128 (1960); Kranda v. Houser-Norbert Medical Corp., 419 N.E.2d 1024, 1039 (Ind. Ct. App. 1981); Sears, Roebuck & Co. v. Roque, 414 N.E.2d 317, 322 (Ind. Ct. App. 1980); Davis v. Davis, 413 N.E.2d 993, 998 (Ind. Ct. App. 1980); Murphy v. Hendrick, 129 Ind. App. 655, 157 N.E.2d 306 (1959); Hickey v. Estate of Hickey, 127 Ind. App. 9, 136 N.E.2d 722 (1956).

[92]*See* Herrara v. Collection Serv., Inc., 435 N.E.2d 88, 89-90 (Ind. Ct. App. 1982) (Indiana Appellate Rule 7.2(C) prevents the waiver of issues for failure to include applicable portions of the trial court proceedings in the transcript or record of the proceedings).

[93]*See* Moore v. State, 426 N.E.2d 86 (Ind. Ct. App. 1981).

[94]Raymundo v. Hammond Clinic Ass'n, 449 N.E.2d 276 (Ind. 1983).

significantly increase the amount of work to be done by appellant's counsel within a short period of time.

At least some reference should be made to the January 1, 1982 revisions to the Indiana Appellate Rules involving the form of the transcript. Although both Appellate Rule 7.1 and Appellate Rule 7.2 have been modified by the January 1, 1982 amendments, the modifications to Appellate Rule 7.1 are probably the more substantial. The revisions to Appellate Rule 7.1 begin with a "recommendation" that post binders, rather than metal strips, be used for fastening or binding the top of the record of the proceedings.[95] It is too early to tell whether this will be treated as merely a recommendation or will be construed as a requirement. The major revisions involve the form in which the transcript is to be combined. If the total record is less than 350 pages, there is no major difference between the old method and the new method for preparing the transcript, except that there is now a requirement that a secure marginal tab be placed at the beginning of the transcript of the evidence and proceedings, and an additional requirement as to what should be included in the table of contents.[96] However, if the total record is more than 350 pages, then the following rules will apply: (1) The transcript will require more than one volume; (2) No volume may be more than 250 pages in length, except that the final volume may be up to 350 pages in length; (3) If a transcript of the evidence and proceedings is included, it must be in a separate volume or volumes; (4) Each volume should be marked as "Volume _____ of _____ Volumes, pp. _____ through _____ ," with the exception discussed immediately below; (5) A separate volume should be created for the table of contents, which will cover all of the volumes and should be titled "The Table Of Contents" and not given a volume number; and (6) In multi-volume sets, a single Clerk's Certificate at the end of the last volume will suffice, if it identifies each volume thereof by number and the page numbers therein.[97] In addition, the table of contents now must briefly describe each exhibit included in the transcript of the evidence and proceedings, as well as the volume and page number at which it was identified and the volume and page number where the court ruled on its admissibility.[98] Finally, the requirement of a certified copy of the motion to correct errors has been

---

[95]IND. R. APP. P. 7.1(A) as amended on January 1, 1982.

[96]*Id.* The rule is not clear as to whether a separate table of contents volume is required where the total record is less than 350 pages, but presumptively it is not. *See infra* note 105 and accompanying text.

[97]IND. R. APP. P. 7.1(A), (C) as amended on January 1, 1982.

[98]IND. R. APP. P. 7.2(C) as amended on January 1, 1982. For a comparison with prior procedure, see Smith v. Chesapeake & O. R.R., 160 Ind. App. 256, 258, 311 N.E.2d 462, 465 (1974); State Bd. of Tax Comm'r v. Associated Auto & Truck Rental, Inc., 148 Ind. App. 611, 613, 268 N.E.2d 626, 627 (1971).

deleted from Appellate Rule 7.2 in order to bring the appellate rule into conformity with various case decisions.[99]

F. Appellant's Brief

Appellate Rules 8.2 and 8.3 discuss, in some detail, the requirements for the various briefs. Subsection (A) of Appellate Rule 8.2 discusses such items as the method of preparation of the brief, the typeface to be used, and the method in which the covers should be done. The appearance of the brief and the conformity with these rules will have some impact on the court's initial reaction to the professionalism of the brief's author. Subsection (B) of Appellate Rule 8.2 outlines the method for citing cases, the necessity and manner of references to the record, and the need to reproduce the relevant portions of statutes, rules, or regulations involved in the issues. Failure to conform with at least some of these requirements has formed the basis for dismissal, affirmance, waiver of issues, or a return of the brief to appellant's counsel with an instruction to re-do the brief.[100] Moreover, the recent cases suggest that there must be strict compliance with *all* of the provisions of Appellate Rule 8.2.[101]

Appellate Rule 8.3 contains a clear and relatively precise discussion of the format for an appellant's and an appellee's brief, provides a less clear statement about the reply brief, and fails to discuss the format required in a brief supporting a motion to dismiss, a brief supporting a petition for rehearing or in opposition to that petition, or a brief supporting or opposing a petition to transfer.[102] Subsection (A) of Appellate Rule 8.3 sets out the various sections that are necessary

---

[99]*See* IND. R. APP. P. 7.2; Smith v. Chesapeake & O. R.R., 160 Ind. App. 256, 311 N.E.2d 462 (1974); Farm Bureau Ins. Co. v. Clinton, 149 Ind. App. 36, 269 N.E.2d 780 (1971); State Bd. of Tax Comm'r v. Associated Auto & Truck Rental, Inc., 148 Ind. App. 611, 268 N.E.2d 626 (1971) (overruling in part Thonert v. Daenell, 48 Ind. App. 70, 263 N.E.2d 749 (1970)); National Bank & Trust Co. of South Bend v. Moody Ford, Inc., 149 Ind. App. 479, 273 N.E.2d 757 (1971). Because it is always possible to have different interpretations of the meaning of the various rules, it is incumbent upon any appellate practitioner to review and fully digest the nature of these changes and their effect on the manner of preparing a transcript.

[100]*E.g.*, Moore v. State, 426 N.E.2d 86, 90 (Ind. Ct. App. 1981) (no citation to the record); Batter Boy Bakery v. Corn, 420 N.E.2d 1360 (Ind. Ct. App. 1981) (failure to add petition, improper use of citation, and brief in wrong color); Tapp v. State, 406 N.E.2d 296, 297 (Ind. Ct. App. 1980) (failure to support allegations of error with authority); Indiana Bonding & Sur. Co. v. State, 132 Ind. App. 626, 178 N.E.2d 65 (1961) (failure to set out relevant statute).

[101]For the proposition that both subsections (A) and (B) may be more strictly enforced in the future, see Moore v. State, 426 N.E.2d 86, 90 & n.5 (Ind. Ct. App. 1981); Alcoa v. Review Bd. of Ind. Empl. Sec. Div., 426 N.E.2d 54, 59 n.6 (Ind. Ct. App. 1981); Batter Boy Bakery v. Corn, 420 N.E.2d 1360, 1362-63 & n.6 (Ind. Ct. App. 1981).

[102]IND. R. APP. P. 8.3.

parts of a complete appellant's brief.[103] The failure of appellant's counsel to either include some of these sections, or to set them out in the order stated by the rule, may well constitute a basis for either waiver, affirmance, or dismissal.[104]

1. Table of Contents.—The first section of the brief mandated by Appellate Rule 8.3 is a table of contents. Except for the statement that the table of contents should refer to the pages in the brief on which the particular sections are found, there are no particular statements made concerning the format of the table of contents or its structure.[105] However, the following suggestions may prove helpful to the appellate practitioner: (1) In paginating the table of contents, utilize roman numerals such as i, ii, and iii to differentiate the pagination in the table of contents from the pagination in the brief itself; (2) The titles of the various sections found in Appellate Rule 8.3(A) should be treated as the primary headings in the brief; (3) Indent any subsections or sub-subsections in a consistent manner with pagination for each; (4) In the argument portion of the brief, give each separate argument a different identifying symbol such as I, A, 1; and (5) Work out a careful phrasing of each argument, as well as its subsections and sub-subsections, so that they all create a logical pattern supportive of the argument. Following these suggestions will provide one additional chance that the court, in reading the table of contents, may be persuaded to the viewpoint expressed in the brief.

2. Table of Cases, Statutes, and Authorities.—Immediately following the table of contents is the table of cases, statutes, and other authorities. As with the previous table, the only requirement set out in Appellate Rule 8.3 is that reference be made to the pages in which each of the specified authorities is discussed. It is better to subdivide this section into a table of cases, a table of statutes and/or rules and regulations, and a table of other authorities. Additionally, the use of small roman numerals for pagination is recommended. A poorly done table of contents or table of authorities will create an unfavorable impression; thus a strict adherence to these requirements is recommended.

3. Statement of the Issues.—The third section of the appellant's brief, and one of the more important sections, is the statement of the issues. The issues section of the brief is vitally important because it determines the *scope* of the appeal. Indiana case law clearly holds that issues raised in the motion to correct errors, but not asserted

---

[103]*Id.* Attorneys involved in cases involving either multiple appellants or cross-appeals will also want to review IND. R. APP. P. 8.3(D), (E).

[104]*See, e.g.*, Chance v. Chance, 400 N.E.2d 1207, 1209 (Ind. Ct. App. 1980).

[105]IND. R. APP. P. 8.3(A)(1).

as issues in the brief, are waived.[106] Thus, it is vital that the viable issues alleged in the motion to correct errors be stated as separate issues on appeal and in a manner which will allow the appellate court to verify that they are the same issues as those raised in the motion to correct errors.[107]

Another reason that the issues section of the brief is so significant involves strategy and persuasiveness, rather than procedural technicalities. Most appellate judges agree that the issues section of the brief is one of the first sections read in their initial review of a brief.[108] For this reason, the manner in which the issues are phrased can create a favorable impression, a neutral impression, or a negative impression. A favorable impression can be accomplished by phrasing each issue in such a manner that it both fairly presents the question and also suggests to the court the conclusion most favorable to the advocate. If this is accomplished, then the advocate has the court leaning favorably toward his position.

4. Statement of the Case.—The fourth section of the brief is the statement of the case. The purpose of the statement of the case is to provide the appellate court with an understanding of the nature of the case, the relevant proceedings in the trial court, and a nonargumentative depiction of each occurrence in the trial court that is alleged to be error. The statement of the case provides the court with a short presentation of the nature of the case and is a source of unbiased statements as to what the trial court did. Although this section may appear relatively unimportant, at least when compared to some of the other sections, a dismissal, affirmance, or waiver of issues has occurred due to a failure to properly prepare this section. The type of deficiencies resulting in an adverse ruling include: (1) A failure to fully set out the judgment in the statement of the case;[109] (2) A failure to state objections to the giving of, or refusing to give, various instructions alleged as error;[110] and (3) A failure to fully set out the conclusions of law and findings of fact in the statement of the case.[111] In order to avoid an adverse ruling, it is probably wisest

---

[106]*See, e.g.*, Little v. State, 413 N.E.2d 639, 642 n.4 (Ind. Ct. App. 1980).

[107]If the appellate court is unable to determine that one or more issues raised in the statement of the issues were not also raised in the motion to correct errors, then those issues are subject to waiver. *See, e.g.*, Hinds v. McNair, 413 N.E.2d 586, 608 n.20 (Ind. Ct. App. 1980).

[108]Presentation by Robert Staton, Presiding Judge of the Third District Indiana Court of Appeals, Nuts and Bolts of an Appeal—Do You Want to Know How to Avoid Pitfalls in an Appeal? 24 (Feb. 26, 1981) (Indianapolis Bar Association Mini-Seminar); R. Staton, Seminar on How to Prepare and Write Your Brief 33 (Apr. 20, 1979) *reprinted in* APPELLATE PRACTICE SEMINAR (1979) (I.C.L.E.F.).

[109]*E.g.*, Michaels v. Johnson, 140 Ind. App. 389, 391-92, 223 N.E.2d 585, 586-87 (1967).

[110]*E.g., id.*

[111]*E.g.*, National Steel Corp. v. Manley, 135 Ind. App. 444, 194 N.E.2d 416 (1963).

for the appellate practitioner to include a verbatim statement of the incidents occurring in the trial court on which each error is predicated or paraphrase these incidents with a full citation to the record.

5. Statement of the Facts.—The fifth section of the brief, involving the statement of the facts, is another important portion of the brief from the judicial point of view. The statement of facts has been pointed to by courts of appeals' judges as one of the first two or three things considered in the initial review of the brief.[112] It is also becoming obvious that the facts involved in the case and the equities resulting from those facts are becoming much more significant in determining the result to be reached on appeal. In fact, one commentator has found that there are few, if any, appellate judges who still view the concept of *stare decisis* and precedent as a valid doctrine for determination of cases rather than merely a means for effectuating the result which they perceive as desirable.[113]

In any case, the equities of the situation are clearly a prevalent question in determining an appeal, and, while one might philosophically quarrel with this rationale for decisionmaking, the appellate practitioner must recognize this fact and structure his statement of the facts and argument so that they are both accurate and supportive of his viewpoint. Thus, the statement of facts should be something more than merely a dry recitation. It should be written in an interesting, graphic manner that presents the facts as favorably to the preparing party's point of view as possible.

In doing so, however, the appellate practitioner must always keep in mind the need for accuracy, the requirement to include all relevant facts,[114] and the requirement that each material fact be documented by citation to the record.[115] Failure to do any of these will raise the possibility of a waiver, affirmance, or dismissal and will certainly result in a loss of credibility with the particular judges involved in the appeal.

6. Summary of the Argument.—The sixth section of the brief is the summary of the argument. If the statement of the issues are the dots in one of those old "connect-the-dots" books, then the summary of the argument is the completed black and white picture, waiting only to be colored in by the argument itself. The summary of the argument is important to the extent that it may provide appellate

---

[112]*See* Presentation *supra* note 108 at 25-26 and R. Staton *supra* note 108 at 33-34; Purver & Taylor, *The Criminal Appeal: Writing to Win!*, 87 CASE & COM. 3, 4 (1982).

[113]*See* R. LEFLAR, APPELLATE JUDICIAL OPINIONS 49-50 (1974).

[114]*See* Anglin v. Grimm, 157 Ind. App. 362, 300 N.E.2d 137 (1973) (failure to include relevant statement of the facts); Chance v. Chance, 400 N.E.2d 1207 (Ind. Ct. App. 1981) (failure to recite evidence presented at trial court level).

[115]*See* Moore v. State, 426 N.E.2d 86, 89 (Ind. Ct. App. 1981) (failure to cite to the record).

judges with their first full picture of both the issues and the legal concepts supporting them. Although there may be no procedural error connected with the summary of the argument, this section has a persuasive effect in creating an initial impression.

7. Argument.—The seventh section of the brief is the argument section itself. This should be the most important section of the brief because the law, legal philosophy, and facts are combined to demonstrate why the appellant's position should prevail. Unfortunately, this is also the section of the brief where most of the procedural errors occur.[116] Some of the types of errors occurring in the preparation of the argument include: (1) A failure to discuss an issue in the argument section of the brief which will result in a waiver of that issue;[117] (2) A failure to cite supporting authorities may result in a waiver of an issue or an affirmance;[118] (3) A failure to provide cogent argument;[119] (4) A failure to cite relevant portions of the record in the argument section of the brief will result in a waiver;[120] (5) A failure to set out the instruction or instructions complained of in the argument section of the brief will result in a waiver;[121] (6) A failure to deal with each alleged error, as a separate error, may result in waiver if the general argument fails to adequately address all of the questions involved;[122] and (7) A failure to accurately refer to the record to support an issue.[123]

8. Conclusion.—The primary purpose for the conclusion of a brief is not to summarize the arguments; that was accomplished by the summary of the argument. The purpose is to inform the court of the type of relief being requested; however, if the relief will be different depending on which issues are accepted as valid by the court, then

---

[116]*See supra* notes 22-25 and accompanying text.

[117]*E.g.*, Ashbaught v. State, 400 N.E.2d 767, 773 (Ind. 1980) (an issue raised in the statement of issues was not discussed in the argument section of the brief for some unknown reason); Lock v. State, 403 N.E.2d 1360, 1369 (Ind. 1980) (issue was included in both the motion to correct errors and the issues section of the brief but not argued in the argument section).

[118]*E.g.*, Dayton Walther Corp. v. Caldwell, 402 N.E.2d 1252, 1261 (Ind. 1980). Many appellate judges do not consider West's Law Encyclopedia, Corpus Juris Secundum, and other general sources to constitute authority. Second, if there is no Indiana authority on the subject, then this should be specifically stated to the court and cases from other states as well as treatises and other scholarly works should be cited.

[119]*E.g.*, American Optical Co. v. Weidenhamer, 404 N.E.2d 606, 622 (Ind. Ct. App. 1980).

[120]*E.g.*, Clark v. Clark, 404 N.E.2d 23, 36-37 (Ind. Ct. App. 1980) (error contended was hearsay but no citation to any specific incidents of hearsay were noted from the record).

[121]*E.g.*, Coker v. State, 399 N.E.2d 857, 861 (Ind. Ct. App. 1980); Taylor v. State, 409 N.E.2d 1246, 1251 (Ind. Ct. App. 1980).

[122]*E.g.*, Piwowar v. Washington Lumber & Coal Co., 405 N.E.2d 576, 582 (Ind. Ct. App. 1980).

[123]*E.g.*, Williams v. State, 408 N.E.2d 123, 125 (Ind. Ct. App. 1980).

the conclusion should be written in terms of distinctly separate requests that are clear in their application. This is all that is necessary for the conclusion; the decision to include any additional material would essentially be a stylistic determination for the appellate practitioner. However, any such additional material should be very brief.

9. Service of Brief.—Only one other basis for a dismissal of an appeal, due to deficiencies related to the brief, has been discovered. An appeal will be dismissed if the appellate practitioner fails to serve a copy of the brief on all of the opposing counsel,[124] or possibly for a failure to timely serve a copy on all counsel.[125] Obviously, this same rule, or a variation of it, is equally applicable to all of the parties and to all of the pleadings needed for the prosecution of an appeal.

G. The Reply Brief

The structuring of an appellant's reply brief is not clearly "blueprinted" or defined in either the Indiana Appellate Rules or the texts on appellate practice and procedure in Indiana.[126] Further, the research for this article has not disclosed any Indiana case discussing the proper structure or format of a reply brief. Clearly, there is a complete lack of guidance in this area. Presumably, the same format required for the appellee's brief is also satisfactory for the reply brief.[127] Whether the reply brief may omit the statement of the issues or the summary of the argument without fear of dismissal, affirmance, or waiver should be addressed by our appellate courts. Until such time as it is addressed by a revision to the appellate rules or through a discussion of the question in a case, good appellate practice would seem to require the inclusion of a statement of the issues and summary of the argument in the reply brief.

Only a few cases exist that involve waiver, dismissal, or affirmance in relation to a reply brief, possibly because it is a discretionary rather than a mandatory pleading. A number of cases hold that new issues or contentions cannot be raised for the first time in the reply brief.[128] These decisions are based on the concept that it would be unfair to

---

[124]*E.g.*, State *ex rel.* Dillon v. Shepp, 165 Ind. App. 453, 332 N.E.2d 815 (1975).

[125]*See* Murphy v. Indiana Harbor Belt R.R., 152 Ind. App. 455, 284 N.E.2d 84 (1972).

[126]*See* IND. R. APP. P. 8.3(C); 4A B. BAGNI, L. GIDDINGS & K. STROUD, INDIANA PRACTICE § 64 (1979 & Supp. 1982); 2 A. BOBBITT, INDIANA APPELLATE PRACTICE AND PROCEDURE 601-02 (1972 & Supp. 1982).

[127]This would require a table of authorities, a statement of the issues, a summary of the argument, the argument, and a conclusion. Sections dealing with the statement of the case and the statement of the facts would be optional and would probably depend on whether there were any need to respond to the appellee's brief in these areas. For the rule concerning the brief of the appellee, see IND. R. APP. P. 8.3(B).

[128]*E.g.*, City of Richmond v. Pub. Serv. Comm'n, 406 N.E.2d 1269, 1278 (Ind. Ct. App. 1980); Saloom v. Holder, 158 Ind. App. 177, 186, 307 N.E.2d 890, 891 (1974).

effectively deny the appellee an opportunity to respond to an issue by permitting the appellant to assert it for the first time in the reply brief. For similar reasons, if an appellant has failed to support an issue with cogent argument or authority in the initial brief, citation of argument and authority in the reply brief will not remedy this defect.[129]

While the appellant's reply brief is discretionary, some cases indicate that the failure to file it may constitute an admission of statements made in the appellee's brief.[130] Thus, a reply brief may be mandatory if the appellee's brief contains misstatements of fact or inaccurately accuses the appellant of misstating or omitting facts.[131]

In addition to those items discussed above, there is possibly one other way in which an appellant might waive an issue, suffer a dismissal, or cause an affirmance through the reply brief. While there are no cases directly on point, it is submitted that a significant number of false, inaccurate, or misleading statements concerning the facts of the case, the citation to the record, or even to Indiana cases might so prejudice a court as to produce a waiver of issues, an affirmance, or a dismissal.

H. The Petition for Rehearing

After the reply brief is filed, the case is submitted to the court of appeals for a determination. When that court's determination is made, the disgruntled party may consider an appeal to the Indiana Supreme Court. The first step in that process is the filing of a petition for rehearing. The petition for rehearing is similar to the motion to correct errors.[132] Both are presented to the lower court, appellate court or trial court, respectively, after the initial determination. Both the petition for rehearing and motion to correct errors are intended to allow the lower court to correct its determination based on the rationale presented to it by the losing party. Like the motion to correct errors, the petition for rehearing forms and limits the issues available to the losing party in its attempt to obtain a reversal from the Indiana Supreme Court.[133] Finally, the issue must also have been preserved in the earlier stages of the appeal.[134]

---

[129]*See* Michaels v. Johnson, 140 Ind. App. 389, 391-92, 223 N.E.2d 585, 586-87 (1967); Rudolph v. Ayde, 84 Ind. App. 202, 204, 149 N.E. 734, 735 (1925).

[130]*See, e.g.*, Campbell v. Colgate-Palmolive Co., 134 Ind. App. 45, 184 N.E.2d 160 (1962).

[131]*See* Indiana Bonding & Sur. Co. v. State, 132 Ind. App. 626, 178 N.E.2d 65 (1961).

[132]*See* 4A B. BAGNI, L. GIDDINGS & K. STROUD, INDIANA PRACTICE § 151 (1979 & Supp. 1982).

[133]IND. R. APP. P. 11(B). *See* Dorweiler v. Sinks, 238 Ind. 368, 370-71, 151 N.E.2d 142, 143-44 (1958) (commingling argument with petition for rehearing was grounds for dismissal).

[134]*See* Cunningham v. Hyles, 402 N.E.2d 17, 21 (Ind. Ct. App. 1980).

There do appear to be two possible exceptions to this general rule in a petition for rehearing. First, because jurisdiction over the subject matter may be raised at any stage of the proceedings, it can be raised for the first time in a petition for rehearing.[135] Second, it would seem that the petitioner should be allowed to address issues raised for the first time by the court of appeals *sua sponte*, since those issues have not been previously briefed by either party.

Along with a waiver of all issues not included in the petition for rehearing, the entire right to appeal to the Indiana Supreme Court may be waived by a failure to timely file the petition for rehearing.[136] Appellate Rule 11(A) provides that the petition and any accompanying brief must be filed with the court within twenty days from the rendition of the adverse decision.[137] Appellate Rule 14(A) further provides that "[n]o extension of time shall be granted to file a petition for rehearing or a petition to transfer or any briefs in connection therewith."[138]

The right to appeal to the Indiana Supreme Court may also be waived due to a defect in the format of the petition.[139] Appellate Rule 11 does not discuss format at length; it requires only that the petition state precisely the reasons why the decision is thought to be erroneous. Appellate Rule 11 further provides that a brief may accompany the petition, but the rule does not further elaborate on any other requirements. However, based on the policy that a petition's purpose is merely to contain a concise recitation of grounds for the appeal coupled with the allowance for filing a brief if the party feels arguments and authorities need to be advanced to the court, a number of Indiana decisions have held that such petitions should not contain argumentative materials.[140] Thus, the insertion of arguments into the petition for rehearing may result in a dismissal and preclude a transfer of the substantive issues to the Indiana Supreme Court, although a transfer to determine the propriety of the dismissal may still be available.

---

[135]*See* Baltimore & O.S.W. Ry. v. New Albany Box & Basket Co., 48 Ind. App. 647, 94 N.E. 906, *reh'g denied*, 48 Ind. App. 657, 96 N.E. 28 (1911).

[136]*E.g.*, Indiana State Fair Bd. v. Hockey Corp. of America, 429 N.E.2d 1121 (Ind. 1982). The appellee's petition to transfer the case to the Indiana Supreme Court was denied because the appellee failed to file a petition for rehearing in the Indiana Court of Appeals. *Id.* at 1122.

[137]IND. R. APP. P. 11(A).

[138]IND. R. APP. P. 14(A). Similarly, the same rule provides the opposing party with 10 days in which to file a brief in opposition which also cannot be extended. IND. R. APP. P. 11(B)(6).

[139]IND. R. APP. P. 11(B).

[140]*E.g.*, Ross v. Schubert, 396 N.E.2d 147 (Ind. Ct. App. 1979); Wyler v. Lilly Varnish Co., 146 Ind. App. 91, 252 N.E.2d 824 (1969), *reh'g denied*, 146 Ind. App. 115, 122, 255 N.E.2d 123, 128 (1970).

Because Appellate Rule 11(A) does not specify the format of a petition for rehearing, the exact method for structuring the petition is left to the appellate practitioner. According to Appellate Rule 11(B), only issues raised in the petition for rehearing may be asserted in the petition to transfer. Because the petition for transfer must be phrased in the manner prescribed in Appellate Rule 11(B)(1), the safest approach would be to structure the petition for rehearing in the same language. In this way, there can be no question as to whether the issues in the petition to transfer are compatible with those raised in the petition for rehearing.

Although Appellate Rule 11 indicates that filing a brief with the petition for rehearing is discretionary, it is strongly recommended. Most authorities agree that a petition for rehearing without a brief has no chance for success,[141] and there simply is no rational basis for throwing away even the smallest possibility for a reversal. Additionally, if the petition for rehearing is prepared in the same format as the petition to transfer, the appellate practitioner may prepare the petition to transfer by merely polishing the prior petition and brief. Here again no guidance is given in the rules, the procedural manuals, or case law regarding the structure of the brief in support of the petition for rehearing; however, the brief should contain a table of contents, a table of authorities, a separate discussion in the argument section on each action of the court alleged to be erroneous, and a conclusion. A statement of the facts and a statement of the case would apparently not be necessary, but something similar to a summary of the argument would probably be advantageous. Finally, a conclusion setting out the relief requested would appear to be necessary to fully inform the court.

I. The Petition to Transfer

If the court of appeals denies the petition for rehearing, then it is necessary to file a petition to transfer with the Indiana Supreme Court within twenty days. As with a petition for rehearing, this time period cannot be extended, and the failure to file within that period of time will result in a dismissal.[142] Because the petition to transfer is jurisdictional in nature, the petitioner must demonstrate compliance with all the prerequisites and state the alleged error in the language required by Appellate Rule 11(B). Failure to do so may also result in the dismissal of the petition.[143] In order to avoid a potential

---

[141]*See, e.g.*, 2 A. BOBBITT, INDIANA APPELLATE PRACTICE AND PROCEDURE 627 (1972 & Supp. 1982).

[142]*E.g.*, Pipe Creek School Township v. Wagler, 194 Ind. 496, 143 N.E. 514 (1924).

[143]*E.g.*, Baker v. Fisher, 260 Ind. 513, 296 N.E.2d 882 (1973); *In re* Aurora Gaslight, Coal & Coke Co., 186 Ind. 690, 692, 115 N.E. 673, 673 (1917).

dismissal, the petitioner must allege in his petition that: (1) On a specified date the court of appeals decided the particular case with a written opinion or memorandum decision; (2) The decision of the court of appeals was against the party seeking transfer; (3) A petition for rehearing was timely filed with the court of appeals; (4) The court of appeals denied the petition for rehearing on a particular date; and (5) The court of appeals committed certain errors, phrased in the language prescribed by Appellate Rule 11(B).[144]

Appellate Rule 11(B) specifies the type of errors which are appealable to the Indiana Supreme Court.[145] While Indiana case law requires that the alleged errors be phrased in the manner suggested in Appellate Rule 11(B)(2), the true intent of Appellate Rule 11 is to limit transfers to these areas rather than to provide the appellate practitioner with the challenge of making his errors fit into the required categories.[146] In establishing these bases for transfer, the petitioner must clearly and concisely show the specific circumstances surrounding the alleged error.[147] Good appellate practice would suggest that argumentative material should be avoided in the petition to transfer. In addition, the errors raised in the petition to transfer must have been first presented to the appellate court in a petition for rehearing and preserved in the earlier stages of the appeal.[148]

As with a petition for rehearing, the party filing the petition to transfer is not required to file a supporting brief. However, considering the general presumptions favoring the lower court's determination, it is doubtful that the petitioner has much chance of success without a substantial brief supporting the petition. The party or parties opposing the petition to transfer, as with the petition for rehearing, have ten days after the filing of the petition or briefs of petitioner, whichever is later, to file a brief in opposition.[149] As with the petition to transfer, there is no extension of time allowed for the filing of a brief in opposition.[150] If copies of the briefs, and presumptively the petition, are not properly served upon all of the parties, then the petition will be dismissed upon a proper motion by the party who was not served with a copy.[151]

---

[144]These allegations are a slightly modified version of those discussed in *In re* Aurora Gaslight, Coal & Coke Co., 186 Ind. 690, 115 N.E. 673 (1917) and 2 A. BOBBITT, INDIANA APPELLATE PRACTICE AND PROCEDURE 634-35 (1972 & Supp. 1982).

[145]IND. R. APP. P. 11(B)(2).

[146]*See* Baker v. Fisher, 260 Ind. 513, 515-16, 296 N.E.2d 882, 883-84 (1973).

[147]*See* IND. R. APP. P. 11(B)(2); *see also* Baker v. Fisher, 260 Ind. 513, 296 N.E.2d 882 (1973).

[148]*See, e.g.*, Dorweiler v. Sinks, 238 Ind. 368, 151 N.E.2d 142 (1958); Cunningham v. Hyles, 402 N.E.2d 17, 21 (Ind. Ct. App. 1980).

[149]IND. R. APP. P. 11(B)(6).

[150]IND. R. APP. P. 14(A).

[151]*See* Sizemore v. Pub. Serv. Comm'n, 242 Ind. 498, 499-500, 180 N.E.2d 232, 233 (1962).

In 1969, in the case of *West v. Indiana Insurance Co.*,[152] the Indiana Supreme Court considered the question of whether a petition for rehearing of a petition to transfer was available after the denial of transfer and stated the following:

> A rehearing is a procedure by which a court can recognize and correct errors in its original ruling. There is no less likelihood that the Supreme Court will commit an error in denying a petition to transfer than there is when it grants such a petition. Furthermore, this court has often recognized a petition for rehearing filed by the respondent after a petition to transfer has been granted. It does not seem to be an equitable procedure to deny the petitioner this same procedure when we deny the petition to transfer.[153]

In the *West* case, the Indiana Supreme Court recognized its fallibility and the desirability of providing an opportunity for the correction of possible errors in their initial determination and opinion.[154] In addition, they recognized the essential unfairness in allowing a petition for rehearing if transfer has been accepted, but denying it when transfer has been denied.[155]

Less than three years later, on January 1, 1972, the Indiana Supreme Court adopted the current Rules of Appellate Procedure. Appellate Rule 11(B)(8), then and now, provides that no petition for rehearing will be permitted to be filed upon the denial of a petition to transfer. On the other hand, no comment is made about the availability of a petition for rehearing when transfer is granted. Thus, the Indiana Supreme Court has overruled the *West* case by its adoption of Appellate Rule 11(B)(8). Under the rule as it presently exists, and until such time as that rule is either revised by the Indiana Supreme Court or modified by case law, it would appear that a petition for rehearing is proper when a transfer is granted, but improper when transfer is denied.

For those who wish to file a petition for rehearing after the granting of a petition to transfer, there are again no clear guidelines set out in the rules for the form of the petition or of the brief. However, it would appear that the format suggested for the petition to transfer would be the safest format for a petition for rehearing of the petition to transfer and that the brief should contain a table of contents, table of cases, statement of the issues or alleged errors,

---

[152]253 Ind. 1, 247 N.E.2d 90 (1969) (decided under the prior rules).
[153]*Id.* at 3, 247 N.E.2d at 92.
[154]*Id.* at 4, 247 N.E.2d at 92.
[155]*Id.* at 3, 247 N.E.2d at 92.

summary of the argument, an argument section with each individual alleged error discussed separately, and a conclusion.

A petition for rehearing of a successful petition to transfer is the last resort for the appellate practitioner in the Indiana appellate courts. Although there may be a potential appeal to the United States Supreme Court if the case involves federal constitutional issues, such an appeal is beyond the scope of this article. Rather, the remainder of this article will explore the availability and utilization of a motion to dismiss as a means of calling procedural errors to the attention of the appellate courts in Indiana.

III. The Rules of the Game for the Opposing Party

If one of the parties to an appeal commits one or more procedural errors, each of which would constitute a possible basis for dismissal, affirmance, or waiver based on prior cases, what can the opposing party do to be certain that these are called to the attention of the particular appellate court? If the error occurred in a trial court, then the automatic reaction to this question would be either a motion to dismiss or motion to strike pursuant to Indiana Trial Rule 12. However, the Indiana Appellate Rules do not discuss the availability of either of these motions.[156] The mechanism available for drawing these errors to the appellate court's attention is provided by case law and is not discussed in the somewhat less than complete rules of appellate procedure.

As in the Indiana Trial Rules, the mechanism for drawing the court's attention to procedural errors during an appeal is either a motion to dismiss or a motion to affirm. Although the difference between a motion to dismiss and a motion to affirm is considered by most authorities to be less than clear,[157] it appears that a dismissal is the appropriate remedy for jurisdictional defects and an affirmance is the proper remedy for nonjurisdictional defects.[158] Jurisdictional defects would include the failure to timely file the motion to correct errors, the praecipe, or the record of proceedings.[159] However, the failure to timely file the appellant's brief, although in no way jurisdictional, is another basis for an automatic dismissal of the appeal.[160] Other

---

[156]*See* Ind. R. App. P. 1-15.

[157]*See* 4A B. Bagni, L. Giddings & K. Stroud, Indiana Practice §§ 81-82 (1979 & Supp. 1982); 1 A. Bobbitt, Indiana Appellate Practice and Procedure 532-33 (1972 & Supp. 1982).

[158]*See supra* note 157.

[159]*See, e.g.*, Bradburn v. County Dep't of Pub. Welfare, 148 Ind. App. 387, 266 N.E.2d 805 (1971); American Metal Climax, Inc. v. State Bd. of Tax Comm'r, 159 Ind. App. 468, 307 N.E.2d 507 (1974); *In re* Little Walnut Creek Conservancy Dist., 419 N.E.2d 170 (Ind. Ct. App. 1981).

[160]*See* 4A B. Bagni, L. Giddings & K. Stroud, Indiana Practice § 82 (1979 & Supp. 1982).

cases also tend to obscure the jurisdictional/nonjurisdictional distinction between a motion to dismiss and a motion to affirm. For that reason, one authority suggests that the appellate practitioner phrase the motion in the alternative, unless the attorney has a recent case indicating that the issue involved is specifically one to dismiss or affirm.[161]

The question as to whether to file a motion to dismiss or affirm in a particular factual situation involves both questions of strategy and practicality. On the strategic side, a motion to dismiss or affirm, if well-taken, may raise serious questions in the minds of the court as to the competency of the opposing counsel and the reliability of other material filed by the opposing party, as well as creating a possible basis for the speedy resolution of the case. Thus, there is a psychological advantage in filing a motion to dismiss or affirm and the potential advantage of obtaining an early resolution of the matter, especially if there is some question about the chances of success on the substantive issues. On the other hand, a weak motion to dismiss or affirm may well cause the court to view the moving counsel as an obstructionist. Therefore, in each case, it is important to weigh the potential advantages and disadvantages in relationship to the strength of the potential grounds for a dismissal or affirmance.

The practical side of the question involves both the potential for waiving the procedural errors and the costs involved in a motion to dismiss or affirm. Appellate Rule 14(B) provides that a petition for an extension of time, when filed by the appellee, must show the court that no other dilatory motions or motions to dismiss will be filed on his or her behalf.[162] Our appellate courts have interpreted this appellate rule to mean that a request for an extension of time to file a brief results in a waiver of the right to assert any future dilatory motions, including a motion to dismiss or affirm.[163]

Because the normal time for filing a motion to dismiss or affirm is after the appellant has filed his brief, this means that any request for an extension of time waives the right to file a motion to dismiss or affirm.[164] As a practical consideration, it is incumbent upon counsel for the appellee to make a determination as quickly as possible after receipt of appellant's brief and the transcript as to whether a sufficient basis exists for a motion to dismiss or affirm. This decision also requires appellate counsel to consider the increased costs of filing a

---

[161]1 A. BOBBITT, INDIANA APPELLATE PRACTICE AND PROCEDURE 533 (1972 & Supp. 1982).

[162]IND. R. APP. P. 14(B).

[163]*See* Clyde E. Williams & Assoc., Inc. v. Boatman, 176 Ind. App. 430, 375 N.E.2d 1138 (1978).

[164]*Id.* at 433-34, 375 N.E.2d at 1140.

motion to dismiss or affirm with a supporting brief, especially because the appellate court may merely take the motion under advisement and require the appellee to go ahead and file his brief on the merits.[165]

Although up to this time the discussion has centered on a motion to dismiss or affirm after the filing of the appellant's brief, this is not the only time that such a motion is available to the appellate practitioner. In addition to this opportunity, the appellate practitioner may file a motion to dismiss or affirm in response to a petition for rehearing and a petition to transfer.[166] As to the time factors involved in this motion, there is no case discussing when the motion to dismiss or affirm should be filed in response to a petition for rehearing. It should probably be filed within the time provided for filing a brief in opposition to the petition for rehearing and, certainly, before the particular court of appeals has reached a determination on the merits. In regards to a petition to transfer, there is authority that a motion to dismiss or affirm must be filed before the Indiana Supreme Court decides whether to accept transfer or the issues will be deemed waived.[167]

Because the Indiana Appellate Rules do not even discuss a motion to dismiss or affirm, they do not indicate any particular format for either the motion or the brief accompanying the motion. However, along with asserting the specific facts relating to each basis for dismissal or affirmance, the motion should probably indicate enough of the history of the case to show that the motion is being timely filed. The brief supporting the motion to dismiss or affirm should contain a table of contents, a table of authorities, a statement of each of the errors alleged similar to a statement of the issues, an argument section containing a separate argument on each of the alleged errors, and a conclusion indicating exactly what relief is requested. In addition, it would probably be wise to include a statement of what has occurred in the case relative to the motion to dismiss or affirm.

IV. Winning The Game

The purpose of this article has been to provide appellate practitioners with an awareness of the increasingly significant areas of potential problems, to point out the types of procedural errors which can occur in each stage of the appellate process, and to remove the veil of obscurity surrounding the availability of a motion to dismiss or affirm, as well as the relatively few criteria for its use. It is hoped

---

[165]After reviewing the matter and reaching an initial decision on the questions, the matter should probably be presented to the client for a final determination.

[166]*See* Ross v. Schubert, 396 N.E.2d 147 (Ind. Ct. App. 1979); Automobile Underwriters, Inc. v. Smith, 241 Ind. 302, 171 N.E.2d 823 (1961).

[167]*See* Kraus v. Lehman, 170 Ind. 408, 422, 84 N.E. 769, 769 (1908).

that the emphasis on the potential hazards arising from the commission of procedural errors, coupled with a fairly complete discussion of the types of errors that can occur in each stage of the appellate process, will result in a significant decrease in the number of cases or issues being decided on procedural grounds and a corresponding increase in the number of cases in which all issues are decided on the merits. All attorneys involved in the appellate game, whether on rare occasions or on a regular basis, should be fully cognizant of the pertinent rules, in order to avoid any error and in order to take advantage of any error by the opposing player.

Notes

The Indiana Home Rule Act: A Second Chance for Local Self-Government

I. Introduction

Although the General Assembly did not grant home rule,[1] a form of local self-government, to Indiana localities until the Powers of Cities Act in 1971,[2] Indiana advocates of home rule have long extolled its virtues:

> Whatever the future may bring forth, the love of local self-government will remain. While the people retain their love of liberty, the balance between the state and municipalities, with the state as the sovereign, the municipality, not an antagonist, but a necessary agent, and a government in purely local matters, will be kept level and safe.[3]

In 1980, after nine years under the Powers of Cities Act, the Indiana General Assembly reevaluted its home rule policies and adopted the Home Rule Act.[4] This recent reaffirmation of home rule makes appropriate an inquiry into how home rule has fared in the courts under the Powers of Cities Act and how the Home Rule Act is likely to change the courts' approach. This Note first establishes some criteria for successful home rule, emphasizing that whether the

---

[1]Home rule has both a political and a legal meaning. Politically, home rule means "local autonomy, the freedom of a local unit of government to pursue self-determined goals without interferences by the legislature or other agencies of state government." Legally, home rule means "a grant of power to the electorate of a local governmental unit." The dual purpose of this term has lead to some confusion concerning home rule's true meaning. Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 *Minn. L. Rev.* 643, 644-45 (1964). This Note will focus on home rule as a legal doctrine rather than a political doctrine.

[2]Powers of Cities Act, Pub. L. No. 250, 1971 Ind. Acts 955 (codified as amended at Ind. Code §§ 18-1-1.5-1 to -30 (1976)) (repealed 1980). Similar provisions appeared in other Indiana statutes which applied to county government, *see* Powers of Counties Act, Pub. L. No. 158, 1975 Ind. Acts 914 (repealed 1980), and to the governments of consolidated cities, *see* Act of Mar. 13, 1969, ch. 173, §§ 201-236, 1969 Ind. Acts 357, 360-67 (repealed 1980). These acts were replaced by the Home Rule Act. Ind. Code §§ 36-1-3-1 to -9 (1982). The Home Rule Act applies to "all units except townships." *Id.* § 36-1-2-23. See *id.* § 36-1-2-23 for the definition of units.

[3]Wolf, *Indiana Municipalities and the State Government*, 4 Ind. L.J. 231, 247 (1929). *See generally* Ice, *Municipal Home Rule in Indiana*, 17 Ind. L.J. 375 (1942).

[4]Ind. Code §§ 36-1-3-1 to -9 (1982).

state or locality should govern on a subject is a policy decision for the legislature rather than the courts. Next the Note briefly describes the form of the Indiana home rule statutes and the courts' application of them. The courts have either misapplied or failed to apply the predecessors of the Home Rule Act, especially the preemption provisions but also the private law and local affairs provisions. The flaws in the Powers of Cities Act and the courts' misapplication of the statute combined unfavorably to restrict local self-government. Finally, this Note will suggest that the Indiana courts should work within the spirit of the Home Rule Act in order to make home rule effective and local initiative possible.

II. The Background and Objectives of Home Rule

The theory of home rule evolved as a remedy to problems created by adherence to the basic notion, followed in Indiana with a few noteworthy exceptions,[5] that no inherent right to local self-government exists.[6] Under this view, the state possesses all legislative power over localities, including "the power to create and the power to destroy; the power to define the form of municipal government and the powers and functions which may—or even must—be exercised [by localities]."[7] Local governments possess no inherent powers but must depend totally upon state legislatures for every power they exercise.[8]

---

[5]Indiana briefly embraced the concept of an inherent right to local self-government in the late nineteenth century in State *ex rel.* Jameson v. Denny, 118 Ind. 382, 21 N.E. 252 (1888), and State *ex rel.* Geake v. Fox, 158 Ind. 126, 63 N.E. 19 (1902). These decisions addressed a General Assembly attempt to appoint the Board of Public Works and Board of Safety for certain Indiana cities and implied that state interference with a locality's choice of its own officials constituted overreaching. The court concluded in *Jameson*: "We do not think that the people have conferred upon the Legislature any such power. It is subversive of all local self-government, a right that the people did not surrender when they adopted the Constitution. They still retained . . . the right to select their own local officers . . . ." 118 Ind. at 400, 21 N.E. at 258.

The courts have never expressly overruled these opinions, and the Indiana Supreme Court cited them as late as 1960, when it was again faced with a state attempt to control the appointment of local officials. *See* Datisman v. Gary Pub. Library, 241 Ind. 83, 92, 170 N.E.2d 55, 60 (1960). After over 50 years of sidestepping the *Jameson* precedent, the court in *Datisman* still was cognizant that complete legislative abrogation of a municipality's appointment or election of its own officials would constitute overreaching. The court in *Datisman* did hold, however, that the General Assembly can prescribe the manner for selecting local officials. 241 Ind. at 92, 170 N.E.2d at 60.

[6]*See generally* Sandalow, *supra* note 1, at 646-48. For a discussion of the short lived idea of an inherent right of local self-government, see generally *id.* at 646 n.11. Sandalow reports that the few decisions which adopted the idea, first espoused in Leroy v. Hurlbut, 24 Mich. 44 (1871), were limited to the issue of whether municipalities have the right to elect their own officials.

[7]Sandalow, *supra* note 1, at 646 (footnotes omitted).

[8]*Id.*

The courts enforced this premise that no inherent right of self-government exists by employing Dillon's Rule,[9] a rule which allowed municipalities only three types of powers:[10] 1) powers expressly granted by the state legislature; 2) powers necessarily implied by express grants from the state legislature; and 3) powers "essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable."[11] In addition to employing Dillon's Rule as a rule of law, the Indiana courts also adopted a rule of construction that resolved any statutory ambiguities concerning the existence of a particular power against the municipality.[12]

Home rule advocates believe that effective local government depends upon the state legislature's grant of broad powers of self-government to localities.[13] These advocates believe that those officials who are most directly responsible to local citizenry can best address local problems and improvements.[14] Likewise, home rule advocates believe that the state legislature can address matters affecting more than one locality or requiring uniform statewide policy better than it can handle time consuming local issues in which the legislature could only prove meddlesome.[15] Home rule advocates realize, however, that a complex society necessitates an interdependence among localities that demands many uniform statewide policies.[16] They also recognize that the parochialism of small communities sometimes requires subjugation to a higher authority which will protect minority views.[17] The challenge in successfully implementing home rule thus lies in finding a proper balance of state and local powers for effective government.

Under home rule, a locality ideally would possess the authority to evolve solutions to its individual problems and to experiment with new approaches to effective local government without first seeking authorization from the state legislature.[18] Successful home rule depends

---

[9]J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911). For cases employing Dillon's Rule, see Freigy v. Gargaro Co., 223 Ind. 342, 60 N.E.2d 288 (1945); Central Union Tel. Co. v. Indianapolis Tel. Co., 189 Ind. 210, 126 N.E.268 (1920).

[10]City of Crawfordsville v. Braden, 130 Ind. 149, 152, 28 N.E. 849, 850 (1891).

[11]*Id.* (quoting J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 89 (4th ed. 1890)).

[12]City of Crawfordsville v. Braden, 130 Ind. 149, 152-53, 28 N.E. 849, 850 (1891).

[13]*See, e.g.*, Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV 269, 279 (1968).

[14]*See, e.g.*, Sandalow, *supra* note 1, at 658, 709-10.

[15]*See, e.g.*, Clark, *State Control of Local Government in Kansas: Special Legislation and Home Rule*, 20 U. KAN. L. REV. 631, 632 (1972); Sandalow, *supra* note 1, at 654-56; Vanlandingham, *supra* note 13, at 270.

[16]*See, e.g.*, Vanlandingham, *supra* note 13, at 272.

[17]*See, e.g.*, Sandalow, *supra* note 1, at 710-12.

[18]City of South Bend v. Krovitch, 149 Ind. App. 438, 273 N.E.2d 288 (1971),

ultimately upon the energy and competence of local officials.[19] Nevertheless, to be successful home rule must meet three criteria which are within legislative and judicial control: 1) home rule powers should be protected from both legislative and judicial erosion;[20] 2) concurrent state and local legislation should be allowed whenever appropriate for effective government;[21] and 3) the division of powers under home rule should change as societal needs change.[22] A delicate interaction between the legislature and the judiciary is necessary to satisfy these criteria.

First, some mechanism should protect home rule powers from legislative and judicial erosion.[23] Unless a locality can be secure in the powers it possesses and will continue to possess under home rule, it is unlikely to exercise independently large scale initiatives but, rather, will continue to seek authorization from the state legislature for its programs.[24] A local government is more likely to try new solutions to its individual problems and to make improvements when assured that its expenditures of time and money do not rely on a power which the state legislature may withdraw easily or which state courts may decide was never a local power. Such a chilling effect on local initiative could result if the legislature reserves unfettered power to preempt local ordinances without any mechanism for making such preemption a conscious and difficult decision.[25] The chill more often results, however, when the courts approach independent local initiatives with distrust,[26] narrowly construing home rule grants and

---

demonstrates what home rule advocates would characterize as the deplorable fate of local initiative without home rule policies. A South Bend Board of Public Works and Safety ordinance provided for training certain firemen to perform special police functions, apparently to promote efficient use of city funds by extracting maximum service from city personnel. The Indiana Court of Appeals responded by narrowly construing a state statute to conclude that the legislature intended separate police and fire departments. *Id.* at 445-46, 273 N.E.2d at 292. Reciting the rule that doubtful claims of local power are resolved against the municipality, the court of appeals held, in essence, that cities were powerless to respond to their problems without explicit authorization from the General Assembly. *Id.* at 446, 273 N.E.2d at 293.

[19]*See* Vanlandingham, *supra* note 13, at 290.

[20]*See infra* notes 23-32 and accompanying text.

[21]*See infra* notes 33-35 and accompanying text.

[22]*See infra* notes 36-37 and accompanying text. The power to tax is sometimes considered a fourth requirement for successful home rule because few municipalities could finance their own activities without it. Vanlandingham, *supra* note 13, at 271.

[23]*See* Sandalow, *supra* note 1, at 707; Vanlandingham, *supra* note 13, at 293; Winter, *Nebraska Home Rule: The Record and Some Recommendations*, 59 NEB. L. REV. 601, 625-26 (1980).

[24]*See* Vanlandingham, *supra* note 13, at 293-96.

[25]*Id.*

[26]*See* Andersen, *Resolving State/Local Conflict—A Tale of Three Cities*, 18 URB. L. ANN. 129, 135-36 (1980); Vanlandingham, *supra* note 13, at 293.

using a doctrine of implied preemption to strike down local ordinances.[27] This judicial reluctance to cooperate with the state legislature's transfer of home rule powers to localities prevails in most state courts:[28] "[W]hen a state supreme court . . . rules against the state and in favor of a municipality, its decision is usually noteworthy."[29] Thus, without some external or internal controls, legislatures and courts can chip away at home rule powers with the result either that such powers no longer exist or that localities are afraid to use them.

Control over judicial erosion of home rule powers should begin with the home rule grant itself. The state legislature should provide the courts with guidance as to the powers localities may and may not exercise. Otherwise, the legislature essentially asks the courts to develop criteria for determining the spheres of local and state government, even though legislators would appear better suited to decide who shall govern the people on what subjects. Usually, a broad, vague grant of statutory authority forces the courts either to balance state and local policies to determine whose interest should predominate under the circumstances[30] or to devise tests capable of consistent application but removed from home rule policies.[31] Because determining whether state or local interests predominate is basically a policy question, the courts are ill equipped to develop meaningful, consistent standards for separating the state and local spheres of government. Judicial erosion of home rule powers, therefore, is less likely to occur when the state legislature offers the courts guidance and when the courts accept that guidance.[32]

Second, for successful home rule, the legislature and the courts

---

[27]Clark, *supra* note 15, at 661-63. For a description of this process of judicial erosion in Nebraska, see Winter, *supra* note 23, at 614-26.

[28]*See, e.g.*, Sandalow, *supra* note 1, at 660-61, including cases cited therein; Vanlandingham, *supra* note 13, at 290-93, including cases cited therein; Winter, *supra* note 23, at 625-26, including cases cited therein.

[29]Vanlandingham, *supra* note 13, at 293.

[30]*See infra* notes 148-55 and accompanying text. Particularly difficult for the courts and detrimental for home rule is the precedential effect of decisions that resolve policy issues without legislative guidelines: "[E]very decision sustaining state legislation appears to be a limitation of municipal initiative, with the implication that even if the legislation were to be repealed, municipal regulation . . . would be impermissible." Sandalow, *supra* note 1, at 662.

[31]One such test, not justified by home rule principles, was Oregon's allocation of procedure to the cities and substance to the state. Andersen, *supra* note 26, at 140-42 (discussing City of La Grande v. Public Employees Retirement Bd., 281 Or. 137, 576 P.2d 1204, *aff'd on rehearing*, 284 Or. 173, 586 P.2d 765 (1978)).

[32]Baum, *A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 571-72; *see* Winter, *supra* note 23, at 628.

should allow and protect concurrent state and local legislation.[33] Although statewide conditions may necessitate state action on a subject, that action might not adequately address the needs of a particular locality.[34] Therefore, both state and local legislation may be appropriate. When a local ordinance does not directly conflict but can harmoniously coexist with a state statute, the courts should not invalidate the ordinance by implied preemption but, rather, should seek to have the legislature define the intended scope of the statute that impinges on home rule powers.[35]

Third, the division of powers under home rule should change as societal needs change.[36] As society increases in complexity and as geographic areas become more interdependent, matters originally appropriate for local regulation eventually demand a uniform state policy which supersedes local interests.[37] For this reason, the legislature must retain the ability to recover, albeit not too rashly, powers initially delegated to localities to prevent home rule from becoming an obstacle to progress in a changing society.

In summary, to evaluate a state's home rule experience, one must examine the interaction between the home rule grant and the court's approach to concurrent state and local legislation according to three criteria: the degree of legislative and judicial erosion of home rule powers, the degree of allowable concurrent state and local legislation, and the capability for reallocation of state and local powers.

III. The Form of the Indiana Home Rule Act

Two basic types of home rule authority exist, constitutional and statutory.[38] Both types can be either self-executing, becoming effective without further action, or charter enabling, allowing cities to draft their own plans for self-government subject to various adoption procedures.[39]

---

[33]Baum, *A Tentative Survey of Illinois Home Rule (Part I): Power and Limitations*, 1972 U. Ill. L.F. 137, 154-55; Baum, *supra* note 32, at 571-72; Vandlandingham, *supra* note 13, at 305.

[34]*See, e.g.*, City of Indianapolis v. Wright, 267 Ind. 471, 371 N.E.2d 1298 (1978); Medias v. City of Indianapolis, 216 Ind. 155, 23 N.E.2d 590 (1939); Board of Pub. Safety v. State *ex rel.* Benkovich, 388 N.E.2d 582 (Ind. Ct. App. 1979); Meinschein v. J.R. Short Milling Co., 157 Ind. App. 53, 298 N.E.2d 495 (1973).

[35]*See infra* text accompanying notes 54-123.

[36]*See* Andersen, *supra* note 26, at 149 (discussing City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978)); Vanlandingham, *supra* note 13, at 272.

[37]Weekes v. City of Oakland, 21 Cal. 3d 386, 405, 579 P.2d 449, 460, 146 Cal. Rptr. 558, 569 (1978) (Richardson, J., concurring).

[38]Note, *Defining "Municipal or Internal Affairs": The Limits of Power for Indiana Cities*, 49 Ind. L.J. 482, 484-85 n.16 (1974).

[39]*Id.*

Indiana chose a statutory grant of home rule powers[40] when it drafted the Powers of Cities Act and the subsequent Home Rule Act. The statutory grant, by definition, lacks the ability of the constitutional grant to place home rule powers virtually beyond legislative erosion and subjects the powers to possible retraction at each legislative whim.[41] On the other hand, Indiana's statutory grant allows greater responsiveness to change than does a constitutional grant, which must be amended before powers can be reallocated.[42] Because it is self-executing, the Indiana statutory grant also avoids any adoption procedure that may discourage cities from accepting home rule under a charter enabling grant.[43]

Home rule grants are further classified into those that employ broad, general language and those that enumerate specific powers.[44] Usually, a broad grant simply confers legislative powers over a city's "municipal affairs."[45] Enumerations may specify all or some powers granted the locality, all or some powers denied the locality, all or some powers reserved by the state, or all or some powers denied the state.[46] Indiana's statute enumerates powers specifically withheld from localities[47] as well

---

[40]Dortch v. Lugar, 255 Ind. 545, 266 N.E.2d 25 (1971), tested the constitutional validity of the Indiana variety of home rule legislation. The court in *Dortch* held that a state law that permitted consolidation of city and county governmental functions in large metropolitan communities was a valid delegation of authority under article IV, section 1 of the Indiana Constitution: "*Such legislation is not regarded as a transfer of general legislative power, but rather as a grant of the authority to prescribe local regulation . . . .* " 255 Ind. at 586, 266 N.E.2d at 50 (quoting 2 E. McQUILLIN, MUNICIPAL CORPORATIONS § 4.09 (3d ed. 1968) (emphasis as supplied by court)).

[41]*See* Vanlandingham, *supra* note 13, at 277.

[42]*See* Andersen, *supra* note 26, at 149. A requirement that legislation allowing preemption uniformly apply to a large number of cities and a strong municipal lobby can enhance the success of statutory home rule. Vanlandingham, *supra* note 13, at 296.

[43]*See* Vanlandingham, *supra* note 13, at 281.

[44]Sandalow, *supra* note 1, at 669. Sandalow contended that the distinction between the broad and the specific grant is more significant than the distinction between the constitutional and the statutory grant because the language of the grant, rather than its source, has more impact upon the courts. *Id.* at 669-70.

[45]*See generally* discussion and cases cited in Sandalow, *supra* note 1, at 652-58; Vanlandingham, *supra* note 13, at 291-93.

[46]*See* Andersen, *supra* note 26, at 150; Sandalow, *supra* note 1, at 652; Vanlandingham, *supra* note 13, at 303-08.

[47]IND. CODE § 36-1-3-8 (1982) provides:

> A unit does not have the following:
> (1) The power to condition or limit its civil liability, except as expressly granted by statute.
> (2) The power to prescribe the law governing civil actions between private persons.
> (3) The power to impose duties on another political subdivision, except as expressly granted by statute.
> (4) The power to impose a tax, except as expressly granted by statute.

as powers exclusively granted to them.[48] The enumeration of those powers denied to localities protects the state's interest in a uniform policy upon subjects such as taxation.[49] The enumeration of exclusive powers granted the locality protects its initiative in areas such as use of public lands and minimizes its fear of implied preemption by the courts.[50] An enumeration of specific powers granted the locality also reminds the legislature of its commitment to home rule, making legislative erosion less covert.[51]

Indiana, therefore, possesses a well-conceived home rule grant. The enumeration of powers in the Indiana statute is preferable to a broad grant of power, which amounts to a mere policy statement without protection from either judicial or legislative erosion. Also, as a self-executing statutory grant, it needs no adoption procedure by the municipalities and affords adaptability to change.[52]

IV. Problematic Aspects of the Indiana Home Rule Experience

Although it is a generally well-drafted statute, experience under the Powers of Cities Act indicates that at least three doubtful areas

---

(5) The power to impose a license or other fee greater than that reasonably related to the administrative cost of exercising a regulatory power.

(6) The power to impose a service charge greater than that reasonably related to the cost of the service provided.

(7) The power to regulate conduct that is regulated by a state agency, except as expressly granted by statute.

(8) The power to prescribe a penalty for conduct constituting a crime or infraction under statute.

(9) The power to prescribe a penalty of imprisonment for an ordinance violation.

(10) The power to prescribe a penalty of a fine of more than two thousand five hundred dollars ($2,500) for an ordinance violation.

(11) The power to invest money, except as expressly granted by statute.

[48]*Id.* § 36-1-3-9(a) provides that "a municipality has exclusive jurisdiction over bridges . . . , streets, alleys, sidewalks, watercourses, sewers, drains, and public grounds inside its corporate boundaries, unless a statute provides otherwise."

[49]*See* Vanlandingham, *supra* note 13, at 310-11.

[50]*Id.* at 296 n.139.

[51]*See* Andersen, *supra* note 26, at 148-49 (discussing City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978)); Vanlandingham, *supra* note 13, at 296 n.142.

[52]The Indiana home rule statute is preferable to the Missouri *imperio in imperium* model, which constitutionally allowed municipal charter provisions to prevail over state law in purely local concerns, thus creating a "sovereignty within a sovereignty." Mo. Const. of 1875, art. IX, §§ 16, 23. *See* Vanlandingham, *supra* note 13, at 284. Indiana's statute is also preferable to the Colorado model, which also constitutionally denies certain powers to the state but does so by enumerating which powers are local. Colo. Const. art. XX, § 6. *See* Andersen, *supra* note 26, at 148-49. Because they are constitutional grants, both the Missouri and the Colorado models hamper adaptability to increasing needs for state uniformity.

remain under the Home Rule Act: state preemption, local power to affect private relationships, and the local affairs limitation.[53]

A. State Preemption

Home rule cannot flourish as long as ordinances governing local concerns are subject to preemption by state legislatures.[54] The real threat to home rule powers, however, derives not from preemption per se, but from implied preemption by the courts.[55] The same power that allows a legislature expressly to invalidate a local ordinance also allows it to effect state policy. Judicially implied preemption has no such redeeming feature and may even defeat the state policy favoring home rule. To prevent legislative and judicial erosion of home rule powers, the home rule grant should address preemption by providing a mechanism which not only would prevent the state legislature from rashly denying a home rule power but also would prevent the courts from making independent determinations that a state statute precludes the operation of a local ordinance. Furthermore, the home rule statute and the courts should recognize that a local ordinance that addresses local needs can coexist with a state statute on the same subject so long as the ordinance does not directly conflict with the statute. This is especially important in a state like Indiana, where the constitution prohibits the state from enacting special legislation for individual localities.[56]

1. The Powers of Cities Act.—The fact that the Indiana General Assembly has twice changed its original preemption language suggests a continuing desire to elicit more acceptable responses from the courts. The original 1971 Powers of Cities Act allowed localities to exercise power "only if and to the extent that such power is not denied or preempted by any other law or is not vested by any other law in a county or state agency, special purpose district, or separate municipality or school corporation,"[57] unless "prohibited by the Constitution of this state or the Constitution of the United States."[58] It further provided that no state statute approved either before or after the Powers of Cities Act

> shall be construed . . . to preempt . . . or to occupy the field . . . so as to deny or supersede the power of any city to enact

---

[53]IND. CODE § 36-1-3-4(b)(2) (1982) limits local authority to "powers necessary or desirable in the conduct of its affairs."

[54]Winter, *supra* note 23, at 625-26.

[55]*Id.*

[56]IND. CONST. art. IV, § 23.

[57]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 1, 1971 Ind. Acts 955 (amended 1973) (repealed 1980).

[58]*Id.* at 965.

> an ordinance or exercise a power dealing with the same subject matter, *unless* such law contains an *express* provision indicating such intention . . . . Any state law whose provisions are *mandatory* and obligatory upon a city . . . shall . . . preempt . . . and . . . occupy the field in which such law operates.[59]

If a state statute were approved after the Powers of Cities Act, it could preempt a local ordinance if there was "a direct and positive conflict . . . that . . . cannot be reconciled."[60] If a state statute had been approved before the Powers of Cities Act, it also could preempt a local ordinance if the statute were "so *comprehensive* as to completely occupy the field of such subject matter, and clearly indicate the intention of the General Assembly to preclude any action by a city relating to the same subject matter."[61] Thus, the exceptions allowing mandatory and pre-existing comprehensive statutes to occupy the field considerably weakened a strong statement that the General Assembly could preclude home rule powers only by express provision.

The only case decided under these original preemption provisions in the Powers of Cities Act, *Meinschein v. J.R. Short Milling Co.*,[62] illustrates how the courts can erode home rule powers by implied preemption. The issue in *Meinschein* was whether the city of Mt. Vernon could pass an ordinance that allowed leasing public property to a private individual who wanted to operate a marina. The Indiana Court of Appeals held that section 2(d) of the Powers of Cities Act, which gave cities the power to "[u]se, protect, maintain and dispose of interests in real or personal property owned by the city,"[63] did not authorize the lease because a state statute enacted prior to the Powers of Cities Act provided that a fifth class city "may lease all or part of" its interest in real estate to "any private not for profit corporation" for recreational activities.[64] This state statute, the court held, was not only a mandate but also the result of a "legislative intent to completely occupy the field."[65]

This conclusion ignored the Powers of Cities Act's basic policy against implied preemption and erred in construing "may" as mandatory when its plain meaning is permissive.[66] The court also defied

---

[59]*Id.* at 968 (repealed 1973) (emphasis added).

[60]*Id.*

[61]*Id.* (emphasis added).

[62]157 Ind. App. 53, 298 N.E.2d 495 (1973).

[63]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 2(d), 1971 Ind. Acts 955, 956 (repealed 1980).

[64]Act of Mar. 13, 1969, ch. 182, 1969 Ind. Acts 468, 468-69 (repealed 1980).

[65]157 Ind. App. at 56, 298 N.E.2d at 497.

[66]*Id.* at 57, 298 N.E.2d at 497. *See* State *ex rel.* Oliver v. Grubb, 85 Ind. 213 (1882) (may is permissive form); *see also* Noble v. City of Warsaw, 156 Ind. App. 618, 297 N.E.2d 916 (1973).

logic by holding that a more specific prior state statute could occupy the field, when a later, more comprehensive state statute addressed the same subject and granted localities the power to determine how to use their land.[67] The strained interpretation of the prior statute in this case suggests that the court would have been willing to call virtually any prior statute either mandatory or comprehensive in order to invalidate a local ordinance on the same subject.

2. The 1973 Amendments.—Wisely, in 1973, the General Assembly repealed the lengthy preemption provision that allowed preemption by mandatory language in a statute.[68] The two shorter preemption provisions were amended to allow cities to exercise power "to the extent that such power is not by express provision denied by law or by express provision vested" in another governmental entity,[69] rather than "to the extent. . . . vested by any other law" in another governmental entity.[70] These changes strongly suggest that the General Assembly intended to eliminate implied preemption completely and to reserve decisions to preempt home rule powers for itself. The case law that followed this amendment is likely to affect the court's future interpretations of the Home Rule Act.

The first preemption case after the 1973 amendment, *City of Richmond v. S.M.O., Inc.*,[71] relied upon *Medias v. City of Indianapolis.*[72] *Medias*, the seminal Indiana Supreme Court case on state preemption of local law, was decided in 1939, over thirty years prior to home rule legislation in Indiana. The issue in *Medias* was whether Indianapolis could require pawnbrokers to obtain a city license in addition to the state's licensing requirement. The supreme court upheld the Indianapolis ordinance, establishing a precedent favorable to concurrent state and local legislation:

> If a city ordinance undertakes to impose regulations which are in conflict with rights granted or reserved by the Legislature, such ordinance must be held invalid. . . . If, however, the statute does not exclusively occupy the field, the munici-

---

[67]157 Ind. App. at 57, 298 N.E.2d at 497.

[68]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 24, 1971 Ind. Acts 955, 968, *repealed by* Act of Apr. 14, 1973, Pub. L. No. 171, § 3, 1973 Ind. Acts 866, 867. *See supra* text accompanying notes 57-61. Similar provisions for counties and for consolidated cities were not repealed until 1980. *See supra* note 2.

[69]Act of Apr. 14, 1973, Pub. L. No. 171, § 1, 1973 Ind. Acts 866, 867 (repealed 1980).

[70]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 1, 1971 Ind. Acts 955, 955 (amended 1973) (repealed 1980).

[71]165 Ind. App. 641, 333 N.E.2d 797 (1975).

[72]216 Ind. 155, 23 N.E.2d 590 (1939).

> pality is not prohibited from imposing additional regulations if they are reasonable and within its legislative authority.[73]

Under *Medias*, cities could legislate on the same subjects as the state, even imposing additional regulations and restrictions, provided that the local ordinance did not directly conflict with a state statute and that a state statute had not exclusively occupied the field.

After the Powers of Cities Act, *Medias* should have remained good law to the extent that it allowed concurrent state and local legislation. The 1973 amendments to the Powers of Cities Act, however, left only a gap for *Medias* to fill. Because the amendments replaced all of the 1971 occupy-the-field language, which allowed implied preemption, with language requiring express preemption, they overruled that part of *Medias* which would invalidate a local ordinance upon a finding that the state statute had occupied the field. By requiring that powers be expressly denied to the municipality or expressly vested in the state,[74] the amendments implied that both the state and locality could regulate concurrently. These amendments implicitly approved the *Medias* holding that a locality may impose stricter but consistent regulation in an area where the state has already regulated.[75] The amendments, however, failed to address what happens when a state statute and a local ordinance so directly conflict that they cannot harmoniously coexist. When such a conflict occurs, *Medias* may be cited for the proposition that the state law must prevail. Because the local government remains a creature of the state government under statutory home rule,[76] state legislation must prevail in a direct conflict.

In *City of Richmond v. S.M.O., Inc.*,[77] the Indiana State Highway Commission had granted a restaurant a curb cut onto a state highway. Subsequently, the Richmond Board of Public Works not only denied the right to the cut but also barricaded it. The court of appeals slighted the Powers of Cities Act with the brief statement that a locality's residual powers under the act were only to be exercised by ordinance, even though the Powers of Cities Act provision referred to powers and functions, not ordinances.[78] Because Richmond had not enacted an ordinance, the court did not apply the act.[79] The court, nevertheless, arrived at the appropriate position on concurrent legisla-

---

[73]*Id.* at 165, 23 N.E.2d at 594.

[74]Act of Apr. 14, 1973, Pub. L. No. 171, § 1, 1973 Ind. Acts 866, 866-67 (repealed 1980).

[75]216 Ind. at 165, 23 N.E.2d at 594.

[76]*See supra* notes 5-12 and accompanying text.

[77]165 Ind. App. 641, 333 N.E.2d 797 (1975).

[78]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 16, 1971 Ind. Acts 955, 964-65 (amended 1973) (repealed 1980).

[79]165 Ind. App. at 645, 333 N.E.2d at 799.

tion. Although it ruled against the city, the court acknowledged that the city could "share in the regulation of a given activity providing that regulation is not exclusively reserved to the state and the municipal regulation does not impose a less stringent requirement than specified by the state."[80] Like *Medias*, the *S.M.O.* decision supports the proposition that a city and state can legislate harmoniously upon the same subject matter.

If the court in *S.M.O.* had construed the Powers of Cities Act, no justification for implied preemption could have been found. Employing the Powers of Cities Act, the court would have considered only whether the state had expressly denied cities the power to regulate curb cuts or had expressly vested the power in another entity. If the legislature had taken neither action, the conclusion would have been that the local ordinance was not preempted. If the two regulations directly contradicted, on the other hand, and no statute had provided for resolution of the conflict, then *Medias* would have applied to favor the state over the city.

In *City of Indianapolis v. Sablica*,[81] the Indiana Supreme Court finally addressed preemption under the Powers of Cities Act. The *Sablica* holding was based on the Indiana Constitution, which prohibits the enactment of local laws for the punishment of crimes and misdemeanors[82] and mandates that all penal laws receive uniform application throughout the state.[83] Although the Powers of Cities Act specifically allowed cities to establish limited punishments for violations of city ordinances,[84] it complied with the Indiana Constitution by limiting this power to actions that do not also "constitute a violation of a law by the General Assembly."[85] In light of the constitutional requirement, it was not surprising that the *Sablica* court held that a local ordinance prescribing punishment for taunting an officer could not coexist with a state statute prescribing punishment for interfering with an officer.[86] It stated that "an impermissible conflict

---

[80]*Id.* at 643, 333 N.E.2d at 798. Language in the state statute which recognized possible local regulation of curb cuts bolstered the court's conclusion. *Id.* at 644, 333 N.E.2d at 799.

[81]264 Ind. 271, 342 N.E.2d 853 (1976).

[82]IND. CONST. art. IV, § 22.

[83]*Id.* § 23.

[84]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(b), 1971 Ind. Acts 955, 965 (repealed 1980).

[85]*Id.* The Home Rule Act contains the same prohibition, IND. CODE § 36-1-3-8(8) (1982), and also allows cities to prescribe penalties of no more than $2,500. *Id.* § 36-1-3-8(10). Unlike the Powers of Cities Act, which allowed up to six months imprisonment for an ordinance violation, Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(b)(2), 1971 Ind. Acts 955, 965 (repealed 1980), the Home Rule Act denies local units the power to prescribe imprisonment for an ordinance violation. IND. CODE § 36-1-3-8(9) (1982).

[86]264 Ind. at 273, 342 N.E.2d at 854-55.

between a city ordinance and a criminal law of the state will exist whenever the ordinance contradicts, duplicates, alters, amends, modifies or extends the subject matter of the statute . . . ."[87]

Although no express constitutional language would have forbidden the *Sablica* court from holding that only direct conflict with a state statute would invalidate a local penal ordinance, thus making the law on state preemption of penal ordinances consistent with the law on preemption of civil ordinances under *Medias* and the Powers of Cities Act, policy considerations would have forbidden that result. Justice dictates that unsuspecting individuals be protected from encountering differing standards of criminal culpability as they travel among Indiana localities. This rationale illuminates the *Sablica* court's further holding that "*to the extent* that *Medias v. City of Indianapolis* sanctions *penal* ordinances which do not directly contradict a criminal statute, it is hereby overruled."[88] This reference to *Medias* in *Sablica* has proven unfortunate. As the *Sablica* court's language appears to recognize but does not clarify, *Medias* does not sanction concurrent state and local penal legislation but, rather, concurrent licensing legislation. Therefore, nothing in *Medias* was overruled in *Sablica*. Nevertheless, although the *Sablica* court's statement did not affect the supreme court decision in *City of Indianapolis v. Wright*,[89] it did confuse the court of appeals in *City of Hammond v. N.I.D. Corp.*[90]

Ignoring the Powers of Cities Act,[91] the Indiana Supreme Court,

---

[87]*Id.*

[88]*Id.*, 342 N.E.2d at 855 (emphasis added).

[89]267 Ind. 471, 371 N.E.2d 1298 (1978). Other cases which correctly applied *Sablica* include Setser v. City of Fort Wayne, 169 Ind. App. 138, 346 N.E.2d 642 (1976), holding that an ordinance which prohibited patronizing a public nuisance was unconstitutional where a statute prohibited frequenting a house of ill fame, and Massey v. City of Mishawaka, 177 Ind. App. 79, 378 N.E.2d 14 (1978), holding that the city could prescribe punishment for the sale of obscene literature because the General Assembly had not established a crime on that subject.

An interesting problem in the *Sablica* logic arose in Indiana State Bd. of Accounts v. Town of Roseland, 178 Ind. App. 661 383 N.E.2d 1076 (1978). In that case, the Indiana State Board of Accounts challenged the constitutionality of the city's lowering of the state 30 mile-per-hour speed limit for residential areas and extracting fines for violation of the new limit, thus constituting a penal ordinance. The court of appeals refused to apply the *Sablica* court's strict reading of the constitutional mandate for uniform penal laws. It held that the General Assembly could authorize concurrent legislation of speed limits, provided that the local limits neither duplicated nor exceeded the state limit. *Id.* at 666, 383 N.E.2d at 1080.

[90]435 N.E.2d 42 (Ind. Ct. App. 1982).

[91]The Powers of Cities Act granted the cities power to "[r]egulate, inspect, license and prohibit crafts, businesses, professions, and occupations which may affect the public health." Powers of Cities Act, Pub. L. No. 250, sec. 1, § 13(a), 1971 Ind. Acts 955, 962 (repealed 1980). The Home Rule Act only prohibits a city from licensing on subjects delegated to state agencies. IND. CODE § 36-1-3-8(7) (1982).

in *City of Indianapolis v. Wright*,[92] clarified that the *Sablica* stance on concurrent state and local legislation applies only to penal ordinances. In *Wright*, an Indianapolis ordinance, which enforced the regulation of massage parlors by revocation of license rather than by fine, withstood a constitutional attack. Misapplying *Sablica*, the trial court had held that under the Indiana Constitution, a state statute establishing criminal penalties for public indecency preempted a municipal ordinance authorizing revocation of massage parlor licenses for the same activity.[93] The supreme court disagreed: "The enforcement remedies contained in [the local ordinance] authorize the controller to suspend or revoke the license of the licensee. Sec. 17-49 [of the ordinance] does not provide criminal misdemeanor penalties for violation of the duties contained in the ordinance."[94] As a "licensing plan" rather than a "penal scheme," the ordinance was not an unconstitutional local law.[95] Apparently, once the court had determined that *Sablica* did not apply to the facts in the case, whether the city had power to license massage parlors under the Powers of Cities Act was not a seriously contested issue since the Act granted cities the power to "[r]egulate, inspect, license and prohibit crafts, businesses, professions, and occupations which may affect the public health."[96]

The Indiana Supreme Court's limitation of the *Sablica* prohibition to local penal ordinances that occupy the same field as a state criminal statute is consistent with home rule policies. A local licensing ordinance that regulates businesses established in the community would not pose the same threat of unforeseeable culpability that a criminal ordinance at variance with a state statute would create for individuals. Rather, a licensing ordinance allows localities to control

---

[92]267 Ind. 471, 371 N.E.2d 1298 (1978).

[93]*Id.* at 472, 371 N.E.2d at 1299.

[94]*Id.* at 474, 371 N.E.2d at 1299.

[95]*Id.* at 475, 371 N.E.2d at 1300.

[96]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 13(a), 1971 Ind. Acts 955, 962 (repealed 1980).

The Powers of Cities Act treated the power to license as distinct from the power to punish crime. It denied cities:

> (b) The power to define and provide for the punishment of crime, except that a city may define and provide punishment for the violation of ordinances, subject to the following limitations:
> (1) The conduct for which punishment is provided shall not also constitute a violation of a law enacted by the General Assembly; and
> (2) No ordinance shall provide for imprisonment in excess of six (6) months, or a fine in excess of one thousand dollars ($1,000); but a combination of fine and imprisonment not exceeding such limits may be provided.

Id. at 965.

Similarly, the Home Rule Act treats licensing, IND. CODE § 36-1-3-8(5) (1982), and enacting penal ordinances, *Id.* §§ 36-1-3-8(8) to (10), as separate powers.

establishments which pose local problems that the General Assembly cannot adequately address. If the courts were to deny cities this licensing power, available under *Medias*, local powers would be restricted rather than enlarged by the enactment of the Powers of Cities Act.

Unfortunately, the Indiana Court of Appeals hopelessly confused the previous case law on preemption in *City of Hammond v. N.I.D. Corp.*[97] In *N.I.D.*, a state statute prohibited the sale of fireworks but provided that relatively harmless devices such as sparklers "shall be permitted at all times."[98] The challenged local ordinance allowed the sale of those devices prohibited by state law as well as those permitted by it, subject to the vendor's obtaining a license and obeying certain regulations in the manner of sale.[99] This situation confronted the court with a different problem than did *Sablica* or *Wright*. In *Sablica*, the local ordinance and the state statute imposed penalties for similar behavior. In *Wright*, the city revoked a license for behavior similar to that for which the state imposed penalties. In *N.I.D.*, however, the ordinance licensed and permitted behavior for which the state imposed penalties. In addition, the city ordinance restricted behavior which the state permitted at all times.

The appropriate approach to this problem would have been, first, to ask whether the Hammond licensing ordinance was prohibited under the Powers of Cities Act. Because the ordinance was arguably within the grant of power to "[r]egulate, inspect, license and prohibit crafts, businesses, professions, and occupations which may affect the public health"[100] and because the General Assembly had not expressly denied cities the power, nor expressly granted it to another governmental entity, the ordinance would have been valid under the Powers of Cities Act.

The second step would have been to ask whether the local ordinance directly conflicted with the state statute, which would render the former invalid under *Medias*. Because the ordinance permitted the sale of fireworks forbidden under the state statute and restricted the sale of devices which were permitted at all times under the statute, the two regulations could not harmoniously coexist and, thus, directly conflicted. Most likely, the ordinance would have been found invalid on this basis.

If necessary, however, the court finally would have reached the question of whether the ordinance was a penal law, prohibited by the

---

[97]435 N.E.2d 42 (Ind. Ct. App. 1982).

[98]IND. CODE § 22-11-14-1 (1982).

[99]435 N.E.2d at 45.

[100]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 13(a), 1971 Ind. Acts 955, 962 (repealed 1980).

Indiana Constitution.[101] This question would have applied only to the aspect of the ordinance which regulated sales prohibited by the state because, once the state imposes penalties, the constitution forbids local penal laws and requires that all criminal laws be uniform.[102]

The court of appeals, however, relied on *Sablica* as authority for Hammond's inability to regulate all fireworks.[103] The court failed to recognize that *Sablica* addressed a statute and ordinance which penalized similar behavior rather than a criminal statute and a directly conflicting licensing ordinance. Ignoring *Wright* altogether, the court said that *Sablica* established a "new rule of total preemption," overruling *Medias*.[104]

In 1979, *Board of Public Safety v. State ex rel. Benkovich*[105] raised a similar but even more difficult problem than did *N.I.D.* In *Benkovich*, firemen challenged an East Chicago ordinance requiring subsequently hired firemen to reside in the city and forbidding the promotion of previously hired firemen who resided out of the city beyond a certain distance. This ordinance potentially conflicted with two state statutes. The first statute provided that:

> Members of the police and fire departments of cities of the second, third, fourth and fifth classes shall reside within the county in which said city is located and said residence shall be within fifteen (15) miles of the corporate limits of such city: provided however, that . . . in cities of the fifth class, the city council may require policemen and firemen to reside within the corporate limits of such city . . . .[106]

The second statute established the criteria for promotions of firemen in cities of a population category that included East Chicago, using language such as "[a]ll promotions shall be made pursuant to written and oral examinations and based on seniority."[107]

To determine whether the state statutes would preempt the local ordinance would require analysis similar to that suggested for the *N.I.D.* controversy. The first question would be whether the local ordinance was prohibited by the Powers of Cities Act. Because the state statutes neither expressly denied to local government nor expressly granted to another governmental entity the power to establish

---

[101]IND. CONST. art. IV, §§ 22-23.

[102]*Id.* § 23.

[103]435 N.E.2d at 47.

[104]*Id.*

[105]388 N.E.2d 582 (Ind. Ct. App. 1979).

[106]Act of Apr. 13, 1975, Pub. L. No. 199, § 1, 1975 Ind. Acts 1096, 1096 (repealed 1981).

[107]Act of Jan. 21, 1972, Pub. L. No. 4, sec. 1, § 10, 1972 Ind. Acts 16, 26 (repealed 1982).

residency and promotion requirements for firemen, the Powers of Cities Act would not prohibit the local ordinance. The second question would be whether a direct conflict between the ordinance and the state statutes would invalidate the ordinance under *Medias*. Because the ordinance could harmoniously coexist with both statutes, no direct conflict existed. A direct conflict should be found only when, as in *N.I.D.*, one would be incapable of complying with both laws when acting on the subject. Invalidation of an ordinance upon a finding of a conflict only in the policies of the regulations, but not in their substance, would constitute implied preemption and, thus, violate the policy disfavoring implied preemption in the Powers of Cities Act.[108] Because East Chicago's additional residence and promotion restrictions did not hamper compliance with the state statutes, they should have been held valid.

The court's major error in *Benkovich* was that, although it cited the mandate for express preemption in the Powers of Cities Act, it nevertheless relied on *Medias* as authority for an occupy-the-field analysis[109] which the 1973 amendment of the Powers of Cities Act had overruled.[110] The *Benkovich* court cited *Sablica* as if it somehow revalidated *Medias*, even though *Sablica* only authorized occupy-the-field analysis for penal statutes and ordinances.[111] The court of appeals determined that the legislature had intended to govern every aspect of a fireman's employment in its statutes, and that such legislative intent to occupy the field constituted an express vesting of power in the state, rendering unnecessary an express denial of power to the municipality:[112] "The power to regulate the residence of municipal firemen vested in the State when it enacted a statute setting forth specific residence requirements."[113] Although the General Assembly may never have anticipated that East Chicago would enact additional residence and promotion requirements, both the legislature and the courts are bound by the Powers of Cities Act requirements for express preemption.

In contrast, *Suburban Homes Corp. v. City of Hobart*[114] demonstrates a proper reading of the Powers of Cities Act's provision requiring preemption where a disputed local power is "by express provision vested" in another entity.[115] In that case, a builder contended

---

[108]*See supra* notes 68-70 and accompanying text.

[109]388 N.E.2d at 585.

[110]*See supra* notes 68-70 and accompanying text.

[111]*See supra* notes 86-87 and accompanying text.

[112]388 N.E.2d at 585.

[113]*Id.*

[114]411 N.E.2d 169 (Ind. Ct. App. 1980).

[115]Act of Apr. 14, 1973, Pub. L. No. 171, § 1, 1973 Ind. Acts 866, 867 (repealed 1980).

that he need only comply with the state and not the local building code. As the court properly recognized in its declaratory judgment, the state building code expressly provided that it would supersede more stringent local codes.[116] Such a provision expressly allocates power between cities and the state.[117] A statute which simply establishes regulations without addressing power allocation, like the one in *Benkovich*, does not expressly vest power in any entity. The *Suburban Homes* court, therefore, complied with the General Assembly's intent to eliminate judicially implied preemption; whereas, the *Benkovich* court defied that intent.

Although the Indiana legislature attempted to prevent judicially implied preemption of municipal powers by requiring express preemption in the 1973 amendments to the Powers of Cities Act, the courts continued to misapply or ignore the preemption provisions. The next question is whether the courts will continue to defy legislative intent when they construe the Home Rule Act.

3. The Home Rule Act.—The Home Rule Act reaffirms the General Assembly's position in the Powers of Cities Act that preemption should remain within the state legislature's express direction. The Act changes the preemption provisions in the Powers of Cities Act in only two ways. First, the vested power provision now permits a locality to exercise its power to the extent that such power is "not expressly granted to another entity"[118] rather than not "by express provision vested by any other law" in another entity.[119] Second, the Home Rule Act denies to local units all powers granted to a state regulatory agency.[120] Powers expressly denied by constitution or statute still invalidate home rule powers under the Home Rule Act.[121]

The courts should interpret the language change in the vested powers provision in conjunction with the new provision granting exclusive powers to regulatory agencies as reinforcing the conclusion that the General Assembly intends to occupy the field only when it expressly says so. Delegation of a subject to an administrative agency is an expressed intent to occupy the field. Otherwise, state statutes, like the residence and promotion requirements in *Benkovich*, should not preempt local legislation on the same subject, even though the two are similar in their specificity and comprehension. In other words, whether a locality like East Chicago can establish residency and promotion requirements concurrent with the state's requirements should

---

[116]411 N.E.2d at 171 (citing IND. CODE § 22-11-1-11 (1976)).

[117]411 N.E.2d at 171.

[118]IND. CODE § 36-1-3-5(2) (1982).

[119]Act of Apr. 14, 1973, Pub. L. No. 171, § 1, 1973 Ind. Acts 866, 867 (repealed 1980).

[120]IND. CODE § 36-2-3-8(7) (1982).

[121]*Id.* § 36-1-3-5(1).

not be an issue for the courts but for the General Assembly. By honoring the policy against implied preemption, the Indiana courts would encourage the General Assembly, when it enacts a new law, to consider whether expressly to deny localities powers on the same subject. If the General Assembly inadvertently fails to deny a power expressly, it can always amend the statute. By forcing an amendment, the courts would leave with the General Assembly the policy decision of what powers localities can exercise.[122]

Preemption should only pose a question for the courts when an ordinance directly conflicts with a statute. Where an ordinance and a statute cannot harmoniously coexist, *Medias* should apply for the proposition that when "a city ordinance undertakes to impose regulations which are in conflict with rights granted or reserved by the Legislature, such ordinance must be held invalid."[123] Although the General Assembly has not expressly provided a mechanism with which courts may resolve a direct conflict between a local ordinance and a state statute, the statute must prevail over the ordinance because the local power that created the ordinance ultimately was derived from the state.[124] The General Assembly has determined that local ordinances are valid unless expressly preempted, thus reserving for itself the decision of how to allocate state and local power as each subject arises. The courts should honor that intent.

B. Local Power to Affect Private Relationships

The Powers of Cities Act denied to localities "[t]he power to enact laws governing private or civil relationships, except as an incident to the exercise of an independent municipal power."[125] The belief that issues traditionally adjudicated in suits at law require statewide uniformity prevails largely without dispute from commentators and without challenge in the courts.[126] Traditionally, the common law governs private relationships and operates uniformly throughout a state. To allow each city free rein to alter the rights and liabilities of these private relationships would create chaos in the state courts, disrupt a private individual's ability to plan his conduct in accordance

---

[122]The 1970 Illinois Constitution shares Indiana's disfavor of implied preemption. For a discussion of the relevant provisions, see generally Baum, *supra* note 32, at 559, 571-73. The Illinois courts, moreover, have honored the fair intent of these provisions. *E.g.*, County of Cook v. John Sexton Contractors Co., 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

[123]216 Ind. 155, 165, 23 N.E.2d 590, 594 (1939).

[124]*See supra* notes 5-12 and accompanying text.

[125]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(a), 1971 Ind. Acts 955, 965 (repealed 1980).

[126]Baum, *supra* note 33, at 153; Sandalow, *supra* note 1, at 674; Sato, *"Municipal Affairs" in California*, 60 CALIF. L. REV. 1055, 1097 (1972); Note, *supra* note 38, at 497. note 38, at 497.

with the law, and subject unsuspecting nonresidents to multitudes of varying and even conflicting liabilities.[127]

Some disagreement does exist, however, over what the parameters of private common law should be and when the indirect impact of a local ordinance on private legal relationships should be prohibited.[128] The private law provision in Indiana's Powers of Cities Act, has been described as susceptible of three interpretations:[129] 1) the strict interpretation that a city can neither define nor affect legal relationships among private persons; 2) the liberal interpretation that a city can regulate private relationships which are in some way related to matters of traditional municipal concern; and 3) the moderate interpretation that a city can affect private relationships only "in aid of some municipal policy or program which is expressed . . . by means other than the regulation of purely civil relationships."[130] The private law provision has been criticized for not focusing on "the importance of private law regulation to the municipality's total program and the extent to which the regulation trenches upon state law."[131] Ideally, a home rule grant should prohibit localities from creating a chaos of differing private liabilities within the state.[132] On the other hand, a home rule grant should not allow a negligible impact upon private legal relationships to invalidate valuable municipal programs.[133]

The first of only two Indiana home rule cases concerning private law relationships, *Barrick Realty, Inc. v. City of Gary*,[134] arose in federal court in 1973. One issue in *Barrick Realty* was whether the city possessed the power to forbid homeowners from erecting "for sale" signs. The court emphasized that the Powers of Cities Act,[135] like the later Home Rule Act,[136] required a liberal construction favoring local powers,[137] and apparently without concern for the ordinance's impact on the private legal relationship between realtor and vendor, the court concluded that, because the plaintiff had identified no state statute which expressly denied the city's power to enact such an ordinance, the municipal ordinance was not preempted.[138]

---

[127]Sandalow, *supra* note 1, at 675.

[128]*See generally id.* at 675-79.

[129]These interpretations apply to the American Municipal Association Model Home Rule Act, MODEL CONSTITUTIONAL PROVISIONS FOR MUN. HOME RULE § 6 (American Municipal Association 1953), which was the model used for the Powers of Cities Act.

[130]Sandalow, *supra* note 1, at 676-77.

[131]*Id.* at 678.

[132]*Id.* at 675.

[133]*Id.* at 679.

[134]354 F. Supp. 126 (N.D. Ind. 1973).

[135]Powers of Cities Act, Pub. L. No. 250, 1971 Ind. Acts 955 (repealed 1980).

[136]IND. CODE § 36-1-3-3 (1982).

[137]354 F. Supp. at 131.

[138]*Id.*

Even if the district court had addressed the possibility that the ordinance prohibiting "for sale" signs violated the Powers of Cities Act private law provision, it should have reached the same result under the moderate and liberal interpretations of the provision.[139] Although the ordinance would violate a conservative interpretation of the provision because it did indeed affect a private law relationship, the ordinance would be valid under a moderate interpretation of the private law provision because it temporarily affected the private legal relationship between realtor and vendor to aid the specific municipal policy of community stabilization. In addition, the ordinance would not test the limits of the liberal interpretation because it was not an attempt to regulate directly a private relationship related to a traditional local concern. The Gary ordinance did not create new private liabilities nor redefine private legal relationships. Its effect on private relationships exemplified "an incident to the exercise of an independent municipal power."[140] If such ordinances were invalidated for their indirect effects on private relationships, cities could not respond to many specifically local problems that the General Assembly is ill qualified to address because of the constitutional prohibition against special legislation for individual cities and because of lack of time and information to address local problems.

The only state court case construing the private law provision in the Powers of Cities Act, *City of Bloomington v. Chuckney*,[141] addressed a more aggressive ordinance than did *Barrick Realty*. In *Chuckney*, Bloomington had adopted a comprehensive ordinance based upon the Uniform Residential Landlord and Tenant Act.[142] This ordinance specified, for example, when a landlord must permit a tenant to entertain guests and when a landlord may enter rented premises. It also created a presumption of pre-existing damage when a landlord failed to conduct an initial inventory of the premises. Although the city contended that the ordinance's purpose was "to enforce municipal housing and safety codes . . . by giving tenants a private cause of action,"[143] the Indiana Court of Appeals held that portions of the ordinance would "so directly affect the landlord-tenant relationship that they cannot be upheld as an incident to the exercise of an independent municipal power."[144]

Only a court applying the most liberal of the three possible interpretations of the private law provision would have upheld the Bloom-

---

[139]*See supra* notes 128-30 and accompanying text.

[140]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(a), 1971 Ind. Acts 955, 965 (repealed 1980).

[141]165 Ind. App. 177, 331 N.E.2d 780 (1975).

[142]UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, 7A U.L.A. 499 (1972).

[143]165 Ind. App. at 181, 331 N.E.2d at 783.

[144]*Id.* at 182, 331 N.E.2d at 783.

ington ordinance. Under the conservative interpretation, the ordinance would have failed because it directly defined and affected the private legal relationships between landlord and tenant by creating new causes of action, redefining old causes of action, and transferring rights from the landlord to the tenant. Under the moderate interpretation, the ordinance would have failed because it directly regulated the purely private landlord-tenant relationship rather than temporarily affecting the relationship to aid a local program. Under the liberal interpretation, the ordinance might have stood, however, because it related to the traditional local concern of housing, even though it directly affected a private relationship. Because the Bloomington ordinance ventured too far into the traditional landlord-tenant relationship to be saved as an "incident to the exercise of an independent municipal power" under the Powers of Cities Act,[145] the court's decision required little discussion of where to draw the line between state and local concerns. Consequently, the Indiana courts will encounter the new private law provision in the Home Rule Act without having developed a method for analyzing it.

The Home Rule Act provision, which denies localities "[t]he power to prescribe the law governing civil actions between private persons,"[146] is more concrete, easier to apply, and less susceptible to independent judicial policymaking than was the broader Powers of Cities Act provision. The prior provision denied municipalities "[t]he power to enact laws governing private or civil relationships, except as an incident to the exercise of an independent municipal power."[147] The Home Rule Act provision clarifies that localities are prohibited only from redefining the duties and liabilites between private individuals in civil actions at law, although the Act is strict in this prohibition. Under the Powers of Cities Act, the courts would have had to determine whether the ordinance's effect on private relationships was direct and substantial, both difficult determinations subject to the court's independent policy decisions.

If the Indiana courts are hereafter faced with an ordinance affecting private relationships, they should accept the plain meaning of the new Home Rule Act provision and determine whether the ordinance redefines the duties and liabilities between private parties in civil actions. Only if it does so should the courts find the ordinance in violation of the Home Rule Act's private law provision. In making this determination, the courts should be mindful of the General Assembly's complete rejection of the language in the Powers of Cities Act that

---

[145]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(a), 1971 Ind. Acts 955, 965 (repealed 1980).

[146]IND. CODE § 36-1-3-8(2) (1982).

[147]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(a), 1971 Ind. Acts 955, 965 (repealed 1980).

suggested that the court could balance state and local interests whenever a local ordinance affected private legal relationships. Thus, the Gary "for sale" sign ordinance would survive under the Home Rule Act. Regulations of rental housing also would survive if, unlike the Bloomington ordinance, they did not attempt to affect private liabilities between landlords and tenants. Further, if the courts accept the plain language of the Act, localities will be able to address their problems without fear that a negligible impact on private relationships could defeat their efforts. The private law provision of the Home Rule Act gives the courts a clear test for upholding or invalidating local ordinances. Consequently, the courts should follow this legislative test and refrain from exercising independent judicial tests that could erode home rule.

C. The Local Affairs Limitation

The Home Rule Act contains one serious flaw in draftsmanship: it provides that a locality has "(1) all powers granted it by statute; and (2) all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute."[148] The Powers of Cities Act contained a similar provision, limiting cities to those powers "necessary or desirable in the public interest of its inhabitants."[149] This type of broad language in home rule grants forces the court to define independently what constitutes local overreaching[150] and may lead to the erosion of home rule powers. Fortunately, the Indiana courts have not used this provision to test the limits of local power in the past, presumably because they regard local officials as better judges of what is necessary and desirable for effective local government. It is hoped that the legislature's enumeration of powers denied in the Home Rule Act[151] will leave little room for the use of this provision in the future.

Broad home rule provisions that vaguely grant cities all power over their municipal affairs require the courts to decide what is "necessary or desirable" for the localities to govern.[152] To make this decision the courts must distinguish what the locality should control

---

[148]IND. CODE § 36-1-3-4(b) (1982).

[149]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 1, 1971 Ind. Acts 955, 955 (amended 1973) (repealed 1980).

[150]*See generally* Andersen, *supra* note 26; Sandalow, *supra* note 1; Sato, *supra* note 126; Vanlandingham, *supra* note 13; Winter, *supra* note 23; Note, *supra* note 38.

[151]IND. CODE § 36-1-5-8 (1982).

[152]Courts tend to construe local affairs provisions less strictly when the only issue is whether a locality may exercise a particular power. When a conflict in the exercise of powers between city and state arises, the courts interpret local affairs provisions more rigidly in deciding which of the two governmental units prevails. Sato, *supra* note 126, at 1062.

from what the state should control.[153] Because most subjects ultimately affect both state and locality, the test under these broad provisions often degenerates into a determination of whether a concern is *purely* local;[154] if not, then it lies outside of home rule powers. Consequently, home rule powers are eroded because subjects which are predominantly local and fairly within a grant of power over local affairs do not qualify as purely local. Additionally, distinguishing local from state affairs often produces case-by-case analysis, creating uncertainty over what powers the localities actually possess.[155]

Even if the Indiana courts regard the "necessary or desirable in the conduct of its affairs" provision as a test for the limits of local power, they will seldom need to venture into that quagmire under the Home Rule Act. The General Assembly has absolved the Indiana courts of that responsibility by enumerating powers denied and granted to localities.[156] Only *Board of Public Safety v. State ex. rel. Benkovich*[157] has opened the door to a local affairs test by characterizing a residency requirement for firemen as "a matter which is [not] simply one of municipal concern."[158] That statement actually constitutes a purely local affairs test which lacks statutory sanction because a necessary and desirable exercise of local power may minimally affect the state. If this reasoning were widely applied, few local powers could survive. Whether an East Chicago fireman resides within city limits concerns East Chicago much more than it does the rest of Indiana.[159] The Indiana courts should not use the local affairs test under the Home Rule Act but should allow local officials to determine what constitutes local affairs and what is necessary and desirable to regulate those affairs.

The Indiana courts may have to use the local affairs provision, however, where local exercises of power have an excessive extraterritorial impact. The Home Rule Act addresses extraterritorial jurisdiction but not extraterritorial impact.[160] A power that operates only

---

[153]Winter, *supra* note 23, at 616; Note, Sonoma County Organization of Public Employees v. County of Sonoma: *The Contract Clause and Home Rule Powers Revitalized in California*, 68 CALIF. L. REV. 829, 842 (1980); Note, *supra* note 38, at 490 n.46.

[154]Winter, *supra* note 23, at 616. The municipal affairs-state interest dichotomy can erode home rule powers to the point of absurdity. *See* Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N.W.2d 862 (1956). In *Omaha Parking Authority*, the Nebraska Supreme Court reasoned that parking areas are connected to streets which are, in turn, connected eventually to state highways; therefore, local parking areas are a state concern. *Id.* at 105, 77 N.W.2d at 869.

[155]Andersen, *supra* note 26, at 134; Note, *supra* note 153, at 842.

[156]*See generally* IND. CODE §§ 36-1-3-1 to -9 (1982).

[157]388 N.E.2d 582, (Ind. Ct. App. 1979).

[158]*Id.* at 585.

[159]*See supra* text accompanying notes 105-113.

[160]IND. CODE § 36-1-3-9 (1982). A commendable feature of this section of the Home

within the boundaries of a locality may, nevertheless, adversely affect surrounding residents and communities.[161] Ordinances which discriminate against commuting workers, for example, may qualify as unnecessary and undesirable in the conduct of a unit's affairs. Nevertheless, because nearly every ordinance has some impact upon surrounding communities, the Indiana courts should allow local ordinances a strong presumption of validity when they are challenged for their extraterritorial impact.[162]

A local affairs test erodes home rule powers by limiting local authority to purely local concerns. Therefore, the Indiana courts should never use the "necessary or desirable" language of the Home Rule Act when more specific provisions suffice. Only in clear cases of abuse, such as extraterritorial overreaching, should the courts open the door to the local affairs line of analysis. Also, before construing the "necessary or desirable in its own affairs" provision of the Home Rule Act as a test for the courts rather than for local officials to implement, the courts should consider whether they would thereby defeat reasonable ordinances which promote effective local government by requiring these ordinances to affect only purely local affairs.[163]

V. A Role for the Courts in Preserving Local Powers under the Home Rule Act

The General Assembly's adoption of the Home Rule Act signifies a reaffirmation of its support for local self-government. This reaffirmation should notify the courts that the General Assembly wants local government to address local problems. Specifically, the recodification should remind the courts that the principles used for allocating state and local powers prior to the Powers of Cities Act no longer apply.[164] The courts should now operate exclusively within the framework of the Home Rule Act.

The courts usually failed to give full recognition to the Powers of Cities Act.[165] At times, they even employed language associated with Dillon's Rule, [166] even though both the Powers of Cities Act and

---

Rule Act is the mechanism it establishes for settling extraterritorial disputes. It provides that a local unit may exercise extraterritorial jurisdiction only by express statutory authorization plus either an agreement from the affected local unit or a court order.

[161]*See* Andersen, *supra* note 26, at 136; Clark, *supra* note 15, at 662; Sato, *supra* note 126, at 1062.

[162]*See* Clark, *supra* note 15, at 670.

[163]Andersen, *supra* note 26, at 134-36.

[164]*See supra* notes 72-76 and accompanying text.

[165]*See supra* text accompanying notes 63-80, 91-104; *see infra* text accompanying notes 168-69.

[166]*See supra* notes 9-12 and accompanying text.

the Home Rule Act provided that Dillon's Rule was no longer applicable.[167] Even under Dillon's Rule, Indiana municipalities could exercise powers implied by their incorporation.[168] These implied powers, called "police powers," were those powers necessary "to promote the comfort, health, convenience, good order and general welfare of the inhabitants,"[169] thus conferring a form of local self-government by incorporation alone or aside from a home rule statute. "Police powers," in other words, belong to a conception of the allocation of state and local powers which terminated when the General Assembly passed home rule legislation. Therefore, the courts should have avoided police power rhetoric when addressing local powers after the Powers of Cities Act.[170]

Rather than sidestepping the home rule statute whenever possible, the courts should honor legislative intent by assuming the role of home rule protector. Because the General Assembly always can expressly deny a local power or expressly grant that power to another entity, the courts should adhere to the legislative policy against implied preemption. Adherence to legislative intent will prevent the gradual erosion of local powers that results when courts make home rule policy decisions independently. In accordance with this principle, courts should exercise care not to inject new rules into those already required under the Act for the valid exercise of local powers.[171]

The courts should also diligently observe the Home Rule Act's mandate that "[a]ny doubt as to the existence of a power of a unit shall be resolved in favor of its existence."[172] This mandate justifies requiring a strong burden of proof for those who seek to invalidate local initiatives.[173] A strong burden of proof would help the courts resolve the preemption, private law, and extraterritorial impact issues likely to arise under the Home Rule Act. Although this presumption of validity might occassionally produce what the court considers an undesirable result,[174] such a result may only indicate that an allocation of powers issue which the legislature needs to address has surfaced. Moreover, the courts' tenacity in following the Home Rule Act

---

[167]Powers of Cities Act, Pub. L. No. 250, sec. 1, § 23, 1971 Ind. Acts 955, 967 (repealed 1980); IND. CODE § 36-1-3-4(a) (1982).

[168]City of Crawfordsville v. Braden, 130 Ind. 149, 152-55, 28 N.E. 849, 850-51 (1891).

[169]*Id.* at 154, 28 N.E. at 851.

[170]In State *ex rel.* Town of Cedar Lake v. Lake Superior Court, 431 N.E.2d 81 (Ind. 1982), the Indiana Supreme Court, without so much as a reference to the home rule statute, found that an ordinance ordering an adult outdoor movie theater to modify its facilities was a valid exercise of the town's police powers. *Id.* at 83.

[171]*See* Winter, *supra* note 23, at 615.

[172]IND. CODE § 36-1-3-3(b) (1982).

[173]*See* Clark, *supra* note 15, at 669.

[174]*See supra* text accompanying notes 105-13.

provision even to an undesirable result would prevent the implied judicial erosion of home rule powers and serve the broader goals of clarifying the home rule law and encouraging local initiative.

VI. Conclusion

In order to foster local initiatives for solving local problems and making improvements without obstructing necessary statewide uniformity, home rule powers must be protected from legislative and judicial erosion, must be allowed to coexist harmoniously with state powers, and must be responsive to a growing complexity and interdependence within the state.

As a statutory grant, the Indiana Home Rule Act allows adaptability to change at the General Assembly's discretion. Its enumerations of powers granted and powers denied provides enough clarity and specificity to forestall judicial erosion and promote confident local action. Realization of the Act's virtues, however, requires that the Indiana courts faithfully observe its underlying policies.

Specifically, the courts should guard against eroding home rule powers in the three problematic areas of state preemption, private law, and local affairs. First, when confronting concurrent state and local legislation, the courts should honor the Home Rule Act's disfavor of implied preemption and leave to the General Assembly the decision of whether the laws can coexist. Only when faced with concurrent regulations that cannot harmoniously coexist should the courts resort to common law. Second, when confronted with an ordinance that affects private relationships, the courts should strictly construe the private law provision of the Home Rule Act to disallow interference with lawsuits between private persons but not to disallow other effects upon private relationships. Finally, the courts should diligently avoid applying the provision of the Act that allows a local unit to exercise only those powers "necessary and desirable in the conduct of its affairs," except where a local ordinance has an unjustifiable, adverse, extraterritorial impact.

The success of local self-government under the Indiana Home Rule Act requires the courts to assume a role as protector of home rule powers. To do so, the Indiana courts should adopt the framework provided in the Home Rule Act, imposing a strong burden of proof upon those seeking to invalidate home rule powers. Most importantly, the Indiana courts should approach their cases with an awareness of how each judicial decision affects the survival and successful operation of home rule in Indiana.

Susan Barnhizer Rivas

Seymour National Bank v. State Interprets the Indiana Tort Claims Act: Can the Enforcers Do No Wrong?

I. Introduction

The Indiana Supreme Court's recent decision in *Seymour National Bank v. State*[1] involved a public policy dispute over the proper method by which a state may encourage vigorous law enforcement while at the same time protecting citizens from negligent or reckless acts committed by officers in the course of duty. In the various appellate opinions of the *Seymour National Bank* case, the courts considered whether the state could be found liable to innocent private citizens who had been injured as a result of a crash with a police vehicle during a high speed chase.[2] The dispute centered upon a portion of the Indiana Tort Claims Act[3] which provides immunity for the state and its employees from losses arising from the "enforcement . . . of a law."[4]

Prior to the passage of the Tort Claims Act, Indiana case law provided that private citizens injured as a result of negligent or reckless law enforcement acts could state a cause of action against governmental units.[5] The supreme court was called upon in *Seymour National Bank* to determine whether that case law was codified in the Tort Claims Act. The court held that the word "enforcement," as used in the Tort Claims Act, clearly encompassed "an officer engaged in effecting an arrest."[6] Thus, the court rejected the codification view and held the state and the officer immune from liability. Although the supreme court's analysis is somewhat suspect, the result reached is clearly supported by recognized rules of statutory construction.[7] However, even if the court's opinion correctly construed the legislative intent in drafting the Act, the court's interpretation of the present wording of the statute has the potential to produce grave injustice.

---

[1]422 N.E.2d 1223 (Ind.), *modified*, 428 N.E.2d 203 (Ind. 1981), *appeal dismissed*, 102 S.Ct. 2951 (1982).

[2]384 N.E.2d 1177 (Ind. Ct. App. 1979), *vacated*, 422 N.E.2d 1223 (Ind.), *modified*, 428 N.E.2d 203 (Ind. 1981), *appeal dismissed*, 102 S.Ct. 2951 (1982).

[3]Ind. Code §§ 34-4-16.5-1 to -19 (1982).

[4]*Id.* § 34-4-16.5-3(7).

[5]Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972). For a discussion of the *Campbell* case, see *infra* notes 32-38 and accompanying text.

[6]422 N.E.2d at 1226.

[7]*See infra* note 113. *See, e.g.*, Borchard, *Governmental Responsibility in Tort, VI*, 36 Yale L.J. 1 (1926); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. Chi. L. Rev. 610 (1955).

This Note examines the potential consequences of the Indiana Supreme Court's interpretation of the Tort Claims Act and calls upon the General Assembly to take action. The legislature is urged to adopt an even-handed balancing of the public policies at stake in the *Seymour National Bank* decision, as opposed to the current mandatory preference for state immunity. The more equitable balancing approach would require law enforcement officials to exercise due care in the performance of their duties. A clear legislative response could avoid problems caused by the court's rejection of the codification view. However, if the General Assembly chooses not to act, the courts themselves should attempt to remedy the potential injustice by narrowly construing the holding in *Seymour National Bank.*

II. Historical Overview

A thorough understanding of the development of the concept of governmental immunity is helpful in evaluating the propriety of present Indiana law in this area.[8] The doctrine of governmental immunity[9] originated in the early English case of *Russell v. Men of Devon.*[10] Since that time the justification for immunizing governments from liability for their torts has been the subject of intense debate.[11]

Prosser summarized the rationales supporting the doctrine of governmental immunity as follows:

> The immunity is said to rest upon public policy; the absurdity of a wrong committed by an entire people; the idea that whatever the state does must be lawful, which has replaced the king who can do no wrong; the very dubious theory that

---

[8]An exhaustive review of the doctrine's development is beyond the scope of this Note. *See* Recent Development, *The Tort Liability of the State of Indiana*: Perkins v. State, 46 Ind. L.J. 544 (1971); Note, *Sovereign Immunity in Indiana — Requiem*, 6 Ind. L. Rev. 92 (1972) [hereinafter cited as *Sovereign Immunity*].

[9]Immunity has been defined as follows:

> An immunity . . . avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but the resulting liability. Such immunity does not mean that conduct which would amount to a tort on the part of other defendants is not still equally tortious in character, but merely that for the protection of the particular defendant, or of interests which he represents, he is given absolution from liability.

W. Prosser, Handbook of the Law of Torts 970 (4th ed. 1971) (footnote omitted).

[10]100 Eng. Rep. 359 (K.B. 1788).

[11]*See, e.g.*, Borchard, *Governmental Responsibility in Tort, VI*, 36 Yale L.J. 1 (1926); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. Chi. L. Rev. 610 (1955).

> an agent of the state is always outside of the scope of his authority and employment when he commits any wrongful act; reluctance to divert public funds to compensate for private injuries; and the inconvenience and embarrassment which would descend upon the government if it should be subject to such liability.[12]

Throughout the last century, critics have argued that it

> is better that the losses due to tortious conduct should fall upon the [government] rather than the injured individual, and that the torts of public employees are properly to be regarded, as in other cases of vicarious liability, as a cost of the administration of government, which should be distributed by taxes to the public.[13]

The concept of immunity, because it resulted in a complete bar to recovery regardless of the circumstances involved, necessarily imposed great hardship upon individuals who suffered losses at the hands of government servants. Over the years, critics of governmental immunity became more numerous and vocal.[14] Eventually the courts began to erode the total bar to recovery, primarily by distinguishing between the types of activities in which government employees were engaged when the losses occurred.[15]

Indiana courts first attempted to avoid the harshness imposed by total immunity by applying what came to be known as the governmental-proprietary distinction.[16] The governmental-proprietary distinction was made possible by the development of the municipal corporation because such an entity performs some functions which are clearly "governmental" in nature and others which are "proprietary" or corporate.[17] Under the governmental-proprietary distinction test, liabili-

---

[12]W. PROSSER, *supra* note 9, § 131, at 975 (footnote omitted).

[13]*Id.* at 978 (footnote omitted).

[14]*See supra* note 11.

[15]W. PROSSER, *supra* note 9, § 131, at 978.

[16]The first case limiting absolute immunity in Indiana was City of Goshen v. Meyers, 119 Ind. 196, 21 N.E. 657 (1889). The court in *Goshen* found liability for acts which were clearly proprietary in nature, but did not clearly enunciate the governmental-proprietary distinction. The terms "governmental" and "proprietary" were never defined with precision but instead were developed on a case-by-case basis. For examples of each type of function, see *infra* note 20.

[17]Under this distinction, courts attempted to classify the various functions of a municipality:

> On the one hand they are subdivisions of the state, endowed with governmental powers and charged with governmental functions and responsibilities. On the other they are corporate bodies, capable of much the same acts as private corporations, and having the same special and local interests and

ty attaches only to those acts which are proprietary in nature, while immunity is afforded for the performance of governmental functions.[18]

Although the governmental-proprietary distinction test was originally applicable only to municipalities, the Indiana Supreme Court later expanded the test's reach to counties with its 1960 decision in *Flowers v. Board of Commissioners*.[19] The courts had great difficulty distinguishing between governmental and proprietary functions,[20] however, and it became apparent that a more manageable standard for determining governmental liability was needed.[21]

With the 1967 decision of *Brinkman v. City of Indianapolis*,[22] the

---

> relations, not shared by the state at large. They are at one and the same time a corporate entity and a government. The law has attempted to distinguish between the two functions, and to hold that in so far as they represent the state, in their "governmental," "political," or "public" capacity, they share its immunity from tort liability, while in their "corporate," "private," or "proprietary" character they may be liable.

W. PROSSER, *supra* note 9, § 131, at 977-78.

[18]*See Sovereign Immunity, supra* note 8, at 94 n.10.

[19]240 Ind. 668, 168 N.E.2d 224 (1960).

[20]In rejecting the governmental-proprietary test, the Florida Supreme Court reviewed the difficulties that Florida courts had encountered in attempting to apply the distinction:

> While holding that a municipality can be held liable for the negligent operation of a fire truck, we have exempted a municipality from liability when a jailor assaulted a prisoner with a blackjack and produced a skull concussion which resulted in his death.
>
> Despite the exemption extended in the case last mentioned, we nevertheless [have] held the municipality liable to a prisoner who had contracted a communicable disease while in the city jail. Under the rule we have followed, if a police officer assaults and injures a prisoner, the municipality is immune but if the police officer is working the prisoner on the public streets and negligently permits his injury, the municipality can be held liable. If the police officer is driving an automobile and negligently injures a citizen, the municipality is liable but if the same police officer gets out of the same automobile and wrongfully assaults a citizen, the municipality is immune from responsibility.

Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132-33 (Fla. 1957) (footnotes and citation omitted).

As one Indiana court noted, it was not "good policy to find that a municipal garbage truck is engaged in a *nonimmune* proprietary function when enroute from a wash rack to the garage while the same truck is engaged in an *immune* governmental function when enroute to a garbage pickup." Brinkman v. City of Indianapolis, 141 Ind. App. 662, 665, 231 N.E.2d 169, 171 (1967).

[21]*See* W. PROSSER, *supra* note 9, § 131, at 970. Prosser criticized the governmental-proprietary distinction as follows:

> There is little that can be said about such distinctions except that they exist, that they are highly artificial, and that they make no great amount of sense. Obviously this is an area in which the law has sought in vain for some reasonable and logical compromise, and has ended with a pile of jackstraws.

Id. at 982.

[22]141 Ind. App. 662, 231 N.E.2d 169 (1967).

Indiana Court of Appeals moved closer toward abolition of the immunity doctrine. Finding that the governmental-proprietary test produced distinctions "only remotely related to the fundamental considerations of municipal tort responsibility,"[23] the court held that "the doctrine of sovereign immunity has no proper place in the administration of a municipal corporation."[24] The court in *Brinkman* concluded that the doctrine of respondeat superior should form the basis for municipal governmental liability,[25] explaining that "[w]hen there is an immune function, the doctrine of *respondeat superior* becomes immaterial. However, when immunity is abrogated, liability depends upon whether or not the doctrine of *respondeat superior* applies."[26] The court of appeals applied the rationale developed at the muncipal level in *Brinkman* to Indiana counties in *Klepinger v. Board of Commissioners.*[27]

Within a year of the *Klepinger* decision, the continued use of the sovereign immunity doctrine to bar tort actions against the state came under attack. The Indiana Supreme Court first retreated from its adherence to the doctrine of sovereign immunity for the state in *Perkins v. State.*[28] The court in *Perkins* chose to base its decision on the grounds that the state should not be immune for torts arising out of the performance of a *proprietary* function rather than base its decision squarely upon the respondeat superior analysis as the court of appeals had done.[29] The court's decision caused much confusion because it seemed to recognize that immunity for the state still existed with regard to *governmental* functions.[30] Thus, in attempting to limit the application of the sovereign immunity doctrine with regard to state liability, the court apparently overruled by implication the reasoning of the *Brinkman* and *Klepinger* cases and re-established some immunity for lesser governmental units.[31]

---

[23]*Id.* at 665, 231 N.E.2d at 171. The court, by way of illustration, explained that "it does not seem to be good policy to permit the chance that a school building may or may not be producing rental income at the time, determine whether a victim may recover for a fall into a dark and unguarded basement stairway or elevator shaft." *Id.*

[24]*Id.* at 666, 231 N.E.2d at 172.

[25]*Id.* at 668-69, 231 N.E.2d at 173. The doctrine of respondeat superior stands for the proposition that a master, in this case the governmental unit, may be held liable for the wrongful acts of his servant, in *Brinkman* the public employee. The court stated that "[c]ommon sense dictates that municipal police are the agents or servants of the city." *Id.* at 668, 231 N.E.2d at 173.

[26]*Id.* at 667, 231 N.E.2d at 172.

[27]143 Ind. App. 155, 239 N.E.2d 160 (1968).

[28]252 Ind. 549, 251 N.E.2d 30 (1969).

[29]*Id.* at 557-58, 251 N.E.2d at 35.

[30]*Id.* at 557, 251 N.E.2d at 35. *See Sovereign Immunity, supra* note 8, at 96-98.

[31]*See Sovereign Immunity, supra* note 8, at 97-98. Because counties and cities were recognized as extensions of the state, the *Perkins* decision should have overruled the court of appeals decisions and re-established the governmental-proprietary test at the municipal and county levels. This suggestion was rejected in the combined case of

Against this confusing backdrop, the Indiana Supreme Court handed down the landmark decision of *Campbell v. State*.[32] In this case, the court directly considered the common law justification for the doctrine of sovereign immunity and found that "[t]he purpose for which the doctrine was created has long since vanished."[33] Consequently, the court appeared to have completely rejected the concept of state immunity.

The court went on, however, to explain that immunity still attached in some areas of governmental activity. The court discussed and endorsed the reasoning of cases finding that the immunity of governmental units was coextensive with the *personal* immunity of public employees under the common law privilege of public immunity,[34] and then stated that the state would be immune to the same extent that a municipal corporation or county retained immunity.[35]

In determining whether personal immunity should attach to the acts or omissions of a public official under the public immunity privilege, decisions referred to by the court in *Campbell* considered "(1) whether the agent's actions were undertaken in furtherance of a 'discretionary' rather than 'ministerial' function; (2) whether the action taken was within the scope of the agent's employment; and (3) whether the action was made in good faith."[36] The court in *Campbell*

Campbell v. State, in which the court attempted to restate its intentions in the *Perkins* decision: "[T]his court in *Perkins* recognized that municipal corporations and county governments had been *eliminated from the scope of sovereign immunity* as to tortious acts." 259 Ind. 55, 61, 284 N.E.2d 733, 736 (1972) (emphasis added).

[32]259 Ind. 55, 284 N.E.2d 733 (1972).

[33]*Id.* at 57-58, 284 N.E.2d at 734.

[34]*Id.* at 62-63, 284 N.E.2d at 737. A privilege differs from an immunity in that a "privilege avoids liability for tortious conduct only under particular circumstances, and because these circumstances make it just and reasonable that the liability shall not be imposed, and so go to defeat the existence of the tort itself." W. PROSSER, *supra* note 9, at 970.

[35]259 Ind. at 63, 284 N.E.2d at 737. The court stated that the defense of sovereign immunity "is not available to any greater extent than it is now available to municipal corporations and counties of this state." *Id.*

[36]*Sovereign Immunity*, *supra* note 8, at 104. *See also* Dalehite v. United States, 346 U.S. 15 (1953); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Wallace v. Feehan, 206 Ind. App. 552, 190 N.E. 434 (1934). The test for whether an act is "discretionary" or "ministerial" in Indiana is found in Adams v. Schneider, 71 Ind. App. 249, 124 N.E. 718 (1919):

> A duty is discretionary when it involves on the part of the officer to determine whether or not he should perform a certain act, and, if so, in what particular way, and in the absence of corrupt motives in the exercise of such discretion he is not liable. His duties, however, in the performance of the act, after he has once determined that it shall be done, are ministerial, and for negligence in such performance, which results in injury, he may be liable in damages.

Id. at 255-56, 124 N.E. at 720 (citation omitted).

concluded its discussion of the bases for the remnants of immunity by stating, without further elaboration, that "it appears that in order for one to have standing to recover in a suit against the state there must have been a breach of duty owed to a private individual."[37] Following *Campbell*, therefore, a breach of duty owed to a private individual could result in liability on the part of a government, although immunity would still attach if the duty were owed solely to the public at large.[38]

Thus, the *Campbell* decision nearly obliterated the state's immunity from potential tort liability. With the state facing possible unlimited liability for each tortious offense, and with only the uncertain remnants of public immunity to shield the state against the feared rash of lawsuits, the General Assembly set out to establish a statutory scheme to address the situation. The Indiana Judicial Study Commission drafted proposed guidelines for legislative action[39] which were followed by the sponsors when the 1973 version of the Tort Claims Act was introduced in the legislature.[40]

The 1973 bill provides an indication that the legislature did not seek to codify Indiana case law when it attempted to address the issue of immunity. Section four of the bill expressly waived the immunity of governmental entities from suit for injuries resulting from the negligent operation of a motor vehicle by a state employee acting within the scope of his employment, but expressly excepted the operation of an emergency vehicle from the waiver.[41] The bill thus distinguished between emergency and non-emergency situations in terms of when immunity should attach. The bill further provided that immunity would attach with respect to a loss which "arises out of

---

[37]259 Ind. at 63, 284 N.E.2d at 737. The court's decision in Roberts v. State, 159 Ind. App. 456, 307 N.E.2d 501 (1974), addressed the question of whether the private duty requirement had to be met in addition to the other factors or if it were an *alternative* ground for recovery and held that the private duty requirement was indeed an alternative ground.

[38]An example of a duty owed solely to the public is found in Simpson's Food Fair, Inc. v. City of Evansville, 149 Ind. App. 387, 272 N.E.2d 871 (1971) (city not liable for failure to provide police protection).

[39]INDIANA JUDICIAL STUDY COMM'N, 1972-73 ANNUAL REPORT, pt. I, § 6 (1973).

[40]*Compare* INDIANA JUDICIAL STUDY COMM'N, TORT CLAIMS: OUTLINE (1972), *with* S. 130, 98th Ind. Gen. Ass., 1st Reg. Sess. (1973).

[41]The text provided:

> Sec. 4. Immunity of all governmental entities from suit is waived for any injury resulting from the negligent operation or use of any motor vehicle or other motorized equipment by any employee while in the scope of his employment. This section shall not apply to the operation of an emergency vehicle as defined by law while being operated or used in response to an emergency call or an emergency situation.

S. 130, 98th Ind. Gen. Ass., 1st Reg. Sess. ch. 2, § 4 (1973).

the failure to adopt or enforce or arises out of the execution or enforcement of any law, except this section shall not exonerate an employee from liability for false arrest or false imprisonment."[42]

Under the 1973 bill, the state would be liable under negligence principles for accidents involving non-emergency state vehicles, would be liable under laws regulating emergency vehicles for accidents involving emergency vehicles *other than* those engaged in law enforcement, and would be *immune* for accidents occurring in the process of enforcing any law.[43] As early as 1973, therefore, legislators were distinguishing between law enforcement related accidents and other accidents involving state employees.

The 1973 bill, based upon the tort claims acts of other states,[44] was passed by both houses of the legislature.[45] However, all references to immunity and liability in the 1973 bill were deleted by a conference committee.[46] The remaining sections—dealing with limitations on amounts recoverable as damages and procedures by which suit might be brought against governmental units—were vetoed because the bill contained an inadvertent error unrelated to the concept of immunity.[47]

The legislature attacked the matter again in its next session, and the result was the passage of the Indiana Tort Claims Act in 1974.[48] The 1974 Act provided for limits on the amount of damages recoverable against the state for tortious acts or omissions,[49] spelled out the specific instances where the state would not be liable for losses resulting from acts or omissions of the state or its employees[50] while

---

[42]*Id.* at § 6(h).

[43]The sweeping immunity provision in section 6(h) covers all enforcement acts. Thus, when an emergency vehicle is involved in an accident *while engaged in law enforcement*, a specific type of "emergency," section 6(h) would apply rather than section 6(g), the general emergency standard.

[44]INDIANA JUDICIAL STUDY COMM'N, TORT CLAIMS: OUTLINE § A(3) (1972).

[45]J. IND. S., 98th Gen. Ass., 1st Reg. Sess. 1182 (1973); J. IND. H., 98th Gen. Ass., 1st Reg. Sess. 1739 (1973).

[46]J. IND. S., 98th Gen. Ass., 1st Reg. Sess. 1069-71 (1973). This deletion may indicate that there was disagreement or uncertainty about the immunity provisions, or it may indicate simply that the conference committee was more concerned with the immediate problems of setting recovery limits and claim procedures.

[47]J. IND. S., 98th Gen. Ass., 2d Reg. Sess. 7 (1974). Governor Bowen vetoed the bill "for the reason that the section of the Indiana Code of 1971 which authorizes the State of Indiana to purchase liability insurance for government vehicles was inadvertently repealed without providing replacement language containing such an authorization." *Id.*

[48]Act of Feb. 19, 1974, Pub. L. No. 142, 1974 Ind. Acts 599 (codified as amended at IND. CODE §§ 34-4-16.5-1 to -19 (1982)).

[49]Act of Feb. 19, 1974, Pub. L. No. 142, § 1, 1974 Ind. Acts 599, 600-01 (codified at IND. CODE § 34-4-16.5-4 (1982)).

[50]Act of Feb. 19, 1974, Pub. L. No. 142, § 1, 1974 Ind. Acts 599, 600, *amended by* Act of Feb. 18, 1976, Pub. L. No. 140, § 2, 1976 Ind. Acts 687, 688-89 (codified as

leaving the doctrine of respondeat superior as the basis for liability in all other instances,[51] and established a method for processing tort claims against the state.[52]

Two cases, *Roberts v. State*[53] and *Board of Commissioners v. Briggs*,[54] decided after the passage of the Tort Claims Act, were based on situations occurring prior to the effective date of the Act. These cases afforded the courts an opportunity to more fully develop the concepts which formed the basis for state immunity after *Campbell*.[55]

The *Roberts* decision clarified the *Campbell* analysis by holding that citizens are entitled to relief "at least to the extent government officials and employees, acting within the scope of their employment, intentionally or negligently breach a duty owed to a private individual."[56] This holding made it clear that under Indiana case law the breach of a duty to a private individual, standing alone, was sufficient to state a claim for relief.

The *Briggs* decision further defined the "private duty" analysis holding that the state is immune from liability "*only if the agent is exercising his governmental discretion in the performance of a purely public duty.*"[57] Perhaps most importantly, the court in *Briggs* remarked

---

amended at IND. CODE § 34-4-16.5-3 (1982)). Section 1 of the 1974 Tort Claims Act provided in pertinent part:

> Sec. 3. A governmental entity or an employee is not liable if a loss results from:
> (1) the natural condition of unimproved property;
> (2) the condition of a reservoir, dam, canal, conduit, drain, or similar structure when used by a person for a purpose which is not foreseeable;
> (3) the temporary condition of a public thoroughfare which results from weather;
> (4) the condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area;
> (5) the initiation of a judicial or administrative proceeding;
> (6) the performance of a discretionary function;
> (7) the enforcement of or failure to enforce a law;
> (8) an act or omission performed under the apparent authority of a statute which is invalid, if the employee would not have been liable had the statute been valid.

Act of Feb. 19, 1974, Pub. L. No. 142, § 1, 1974 Ind. Acts 599, 600 (codified as amended at IND. CODE § 34-4-16.5-3 (1982)).

[51]Act of Feb. 19, 1974, Pub. L. No. 142, § 1, 1974 Ind. Acts 599, 600 (codified as amended at IND. CODE § 34-4-16.5-3 (1982)).

[52]Act of Feb. 19, 1974, Pub. L. No. 142, § 1, 1974 Ind. Acts 599, 601-03 (codified as amended at IND. CODE §§ 34-4-16.5-5 to -17 (1982)).

[53]159 Ind. App. 456, 307 N.E.2d 501 (1974).

[54]167 Ind. App. 96, 337 N.E.2d 852 (1975).

[55]The *Campbell* decision had merely mentioned breach of a private duty as a necessity for state liability in passing, and did not define the parameters of this "private duty" analysis. *See supra* notes 37-38 and accompanying text.

[56]159 Ind. App. at 465, 307 N.E.2d at 506-07.

[57]167 Ind. App. at 110, 337 N.E.2d at 862.

in dicta that "[t]his formulation appears to coincide with the exceptions to liability set out in the new Tort Claims Act passed by the Indiana Legislature."[58]

The immunity provisions of the Indiana Tort Claims Act were clarified and expanded by the General Assembly's 1976 amendments to the Act.[59] The relevant provision of the 1976 amendments provided that the state is not liable for "the adoption and enforcement of or failure to adopt or enforce a law, including rules and regulations, unless the act of enforcement constitutes false arrest or false imprisonment."[60] This is the statutory language which the Indiana courts attempted to interpret in the *Seymour National Bank* case.

III. *Seymour National Bank v. State*

A. Facts and Procedure

On November 28, 1974, an Indiana state trooper stopped an automobile which he believed was being operated in violation of a state bumper height statute.[61] The trooper discovered that the driver had no driver's license or vehicle registration and noticed what appeared to be bullet holes in the trunk of the suspect's car.[62] Instead of complying with the officer's request to come back to his police car for identification, the suspect drove off at a high rate of speed.[63] A chase ensued during which the speed of the two autos at times exceeded 100 miles per hour.[64] As the trooper passed a string of cars, the driver of one of the cars turned left in front of the officer.[65] A crash resulted in which two passengers in the car were killed and the driver was severely disabled.[66]

The Seymour National Bank, as guardian and special administrator for the estates of the occupants of the car, filed suit in tort against the State of Indiana seeking damages for personal injuries, wrongful death, and property damage.[67] The trial court granted summary judgment in favor of the state, holding that the state was granted immunity

---

[58]*Id.*

[59]Act of Feb. 18, 1976, Pub. L. No. 140, § 2, 1976 Ind. Acts 687, 688-89 (codified at IND. CODE § 34-4-16.5-3(1) to (14) (1982)).

[60]Act of Feb. 18, 1976, Pub. L. No. 140, § 2, 1976 Ind. Acts 687, 689 (codified at IND. CODE § 34-4-16.5-3(7) (1982)).

[61]422 N.E.2d at 1224.

[62]*Id.*

[63]*Id.* at 1225.

[64]*Id.*

[65]*Id.*

[66]Brief for Appellant at 7, Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979).

[67]*Id.* at 12.

on these facts by the Indiana Tort Claims Act.[68] The plaintiffs appealed, basing their case upon well-settled Indiana law to the effect that "it will be presumed that the legislature does not intend by the enactment of a statute to make any *change* in the common law beyond what it declares, either in express terms or by unmistakable implication."[69]

The plaintiffs' case, stripped to its essentials, consisted of legislative history which indicated that the legislature intended merely to codify the case law, coupled with reliance upon the rule of statutory construction that statutes in derogation of the common law should be strictly construed. The state's case basically depended upon legislative history which indicated that the legislature intended to change the common law, together with reliance upon the rule of statutory construction that subsequent amendments are persuasive, although not controlling, authority as to what the legislature intended in the original act.

B. Court of Appeals Decision

The court of appeals, in an opinion written by Judge Robertson, reversed and remanded the trial court's grant of summary judgment for the state.[70] The court of appeals opinion contained a careful review of Indiana case law as it existed prior to the passage of the Tort Claims Act.[71] The court found that under case law precedent a cause of action against the state would be stated if the plaintiff could show that "(1) the officer was acting in a ministerial capacity; or (2) the officer owed a private duty to the plaintiff to exercise due care."[72]

The court then turned to the facts of the *Seymour National Bank* case to determine whether a cause of action against the state would have existed prior to the passage of the Tort Claims Act. The court concluded that drivers of emergency vehicles owe a duty of care to private individuals and that the trooper, while in hot pursuit, was performing a ministerial function.[73] Therefore, the court found that the plaintiffs had stated a cause of action under the common law.[74]

It was thus necessary to determine whether the Tort Claims Act granted immunity in derogation of the plaintiffs' common law rights. The decision turned upon the court's interpretation of Indiana Code

---

[68]422 N.E.2d at 1226.

[69]Brief for Appellant at 12, Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979).

[70]384 N.E.2d 1177 (Ind. Ct. App. 1979).

[71]*Id.* at 1181-84.

[72]*Id.* at 1183.

[73]*Id.* at 1184-85.

[74]*Id.* at 1185.

section 34-4-16.5-3(7) which states that a governmental entity or employee is not liable for a loss resulting from "the enforcement of [a law] or failure to . . . enforce a law."[75]

The court concluded that with respect to the failure to enforce a law the legislature intended to codify the holding of *Simpson's Food Fair, Inc. v. City of Evansville.*[76] The court interpreted the *Simpson's Food Fair* case to stand "for the proposition that the *decision* to enforce or not to enforce a law is a discretionary act . . . owed solely to the public"[77] and is therefore protected activity. The court stated that, "[w]ith respect to the immunity from losses resulting from the *enforcement* of the law, the legislative intent is not so easily discerned,"[78] and that the term "enforcement" could reasonably include "(1) the decision to enforce; (2) the decision to enforce in a particular manner; (3) the actual implementation of such a decision; and (4) the *result* of enforcement . . . upon those persons who are the object of the decision to enforce the law."[79] The court then proceeded to examine which, if any, of these concepts the legislature intended to include through its usage of the word "enforcement."

Because the decision to enforce is the converse of the decision not to enforce, the court held that consistency dictated that both be protected.[80] The court also found it clear that the legislative intent was to protect officials from the *result* of decisions to enforce upon the object of the enforcement,[81] finding that the 1976 amendments to the Act[82] disclosed such an intent.[83] However, the court was unable to say whether the plain meaning of "enforcement" included the decision to enforce in a particular manner or the actual implementation of such a decision and thus resorted to its interpretive powers to construe the statute.[84]

In so doing, the court relied upon the rules of statutory construc-

---

[75]IND. CODE § 34-4-16.5-3(7) (1982).

[76]149 Ind. App. 387, 272 N.E.2d 871 (1971).

[77]384 N.E.2d at 1184.

[78]*Id.* at 1185.

[79]*Id.*

[80]*Id.*

[81]*Id.* at 1186.

[82]Act of Feb. 18, 1976, Pub. L. No. 140, § 2, 1976 Ind. Acts 687 (codified at IND. CODE § 34-4-16.5-3(1) to (14) (1982)).

[83]384 N.E.2d at 1186 n.11. For the text of the relevant provision of the amendments, see *supra* text accompanying note 60. The court stated that "[t]he amendments . . . clearly disclose that the legislature was concerned with the end result of enforcement upon the object thereof." 384 N.E.2d at 1186 n.11. This interpretation means that immunity attaches with regard to the person or persons against whom the law is enforced, but no immunity is provided from results of enforcement attempts as to persons other than those against whom the law is enforced.

[84]384 N.E.2d at 1186.

tion that statutes should not be construed in a manner which results in harsh or unjust consequences; that statutes in derogation of the common law should be strictly construed; and that in cases of doubt courts should favor a construction in harmony with the common law. The court found that "enforcement" did not include the mechanical implementation of the decision to enforce a law.[85] Noting that immunizing the activities of the state and its employees in the actual implementation of the decision to enforce a law "would be to sanction and permit negligent and even reckless implementation of such a decision,"[86] the court of appeals refused to find such a legislative intent.

C. Supreme Court Decision

The Indiana Supreme Court, in a 3-2 decision, reversed the court of appeals.[87] The majority rejected the contention that the term "enforcement of a law" was ambiguous, stating that "an officer engaged in effecting an arrest is in fact enforcing a law."[88]

The plaintiffs in *Seymour National Bank* contended that the Tort Claims Act merely codified the common law as it existed immediately prior to the passage of the Act.[89] Alternatively, the plaintiffs argued that the evidence supporting that proposition at least rendered the meaning of "enforcement" ambiguous and that if the court found the term ambiguous, application of the rule of statutory construction that statutes in derogation of common law rights should be strictly construed would then be necessary.[90] The state countered by asserting that the meaning of "enforcement" was clear and unambiguous.[91] The state claimed that, even if the court found ambiguity in the 1974 Act, this ambiguity was removed by the amendments in 1976.[92]

Accepting arguendo the plaintiffs' contention that the statute was ambiguous, the court stated that it perceived the 1976 amendments "as having a clarifying effect on the statute insofar as *all* acts of enforcement save false arrest and imprisonment now render the State immune."[93] Thus, the court concluded that the trooper was engaged

---

[85]*Id.*

[86]*Id.*

[87]422 N.E.2d 1223 (1981).

[88]*Id.* at 1226.

[89]*See* Brief for Appellant at 9-19, Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979).

[90]422 N.E.2d at 1226.

[91]Brief for Defendant-Appellee in Support of Petition for Rehearing at 12, Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979).

[92]*Id.* at 6-8.

[93]422 N.E.2d at 1226. The Indiana Code section governing immunity currently provides immunity *inter alia* for the following:

(5) the initiation of a judicial or administrative proceeding;

in "enforcement" within the meaning of the Tort Claims Act when the accident occurred.

Justices DeBruler and Hunter authored separate dissenting opinions. Justice DeBruler agreed with the analysis in Judge Robertson's opinion for the court of appeals finding that the trooper owed a duty of care toward private individuals.[94] He pointed out that in addition to the canons of statutory construction relied upon by Judge Robertson, he would add the rule that apparently conflicting statutes should be construed in a manner so as to bring them into harmony whenever reasonably possible.[95] In applying this rule, Justice DeBruler noted that the immunity statute was not only in conflict with the state's emergency vehicle operation laws,[96] but was also in derogation of the common law. Justice DeBruler reasoned that by construing the immunity statute so as to make it applicable only in circumstances involving a purely public duty, the "impediment of the common law would be lessened, unjust consequences would be reduced in number, and the two statutes would be left viable and in harmony."[97]

Justice Hunter found the majority's decision unsettling. He charged that the court's holding that citizens would have no recourse for injuries suffered at the hands of a governmental employee "enforcing a law," even if such conduct was "malicious, grossly negligent, or in willful and wanton disregard for public safety or property,"[98] resulted in a return "to the anachronistic notion that 'the King can do no wrong.' "[99] He reviewed statutes passed by the legislature which prohibit gross negligence and wanton or malicious conduct on the part of law enforcement officials and concluded that "[i]t is incongruous" in light of these statutes that the legislature would pass a law bar-

---

(6) the performance of a discretionary function;
(7) the adoption and enforcement of or failure to adopt or enforce a law, including rules and regulations, unless the act of enforcement constitutes false arrest or false imprisonment;
(8) an act or omission performed in good faith and without malice under the apparent authority of a statute which is invalid, if the employee would not have been liable had the statute been valid;
. . .
(11) failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety.

IND. CODE § 34-4-16.5-3 (1982).

[94]422 N.E.2d at 1226-27 (DeBruler, J., dissenting).

[95]*Id.* at 1227.

[96]*See* IND. CODE § 9-4-1-25 (1982).

[97]422 N.E.2d at 1227 (DeBruler, J., dissenting).

[98]422 N.E.2d at 1227 (Hunter, J., dissenting).

[99]*Id. But see infra* note 104.

ring victims "from obtaining redress from the offending governmental entity in our courts of law."[100]

Justice Hunter also noted that "enforcement" does not apply only to police officers[101] and that the legislature's use of the term in other statutes "gives rise to various connotations and interpretations of the word 'enforcement.' "[102] Warning that the majority's opinion would result in the development of dubious distinctions between the "administration" and "enforcement" of laws,[103] he concluded that the position of the court of appeals was correct in that the statute "embraced and codified the common law of this state as it existed at the time" the Tort Claims Act was passed.[104]

The Indiana Supreme Court granted a rehearing and issued a modification of its earlier opinion, from which Justices DeBruler and Hunter again dissented. The majority reaffirmed its position that the language of the statute as amended was clear.[105]

The most interesting segment of the modified opinion dealt with the court's analysis of the application of the Tort Claims Act to the willful and wanton acts of public officials. The court indicated that in some instances public law enforcement officials may be personally liable when:

> an employee's acts, although committed while engaged in the performance of his duty, might be so outrageous as to be incompatible with the performance of the duty undertaken. In such a case, it cannot be said that an injury resulting therefrom resulted from the performance of the duty. Such acts, whether intentional or willful and wanton, are simply beyond the scope of the employment.[106]

The court concluded that no immunity attached with regard to acts "so incompatible with the performance of duty as to be outside the scope of the employment . . . either to the employee or to the governmental entity, which has no need for it, inasmuch as there is no basis for liability in it."[107]

Justice Hunter reaffirmed his adherence to his dissent from the original opinion and renewed his warning that the court's opinions would result in the development of dubious distinctions between enforcement, administration, and implementation of laws.[108]

---

[100]422 N.E.2d at 1227-28 (Hunter, J., dissenting).

[101]*Id.* at 1228. *See also infra* notes 113-16 and accompanying text.

[102]422 N.E.2d at 1228 (Hunter, J., dissenting).

[103]*Id.* at 1229.

[104]*Id.*

[105]428 N.E.2d 203 (1981).

[106]*Id.* at 204 (footnote omitted).

[107]*Id.*

[108]428 N.E.2d at 205-06 (Hunter, J., dissenting). For a discussion of the court's

IV. Impact on Indiana Law

Underlying the immediate dispute in the *Seymour National Bank* case is a clash between views as to what the courts may consider when applying statutory law to specific cases. The court of appeals believed that public policy permitted it to consider the equities of a case when determining whether the legislature intended for statutory language to be read literally. The supreme court took a more deferential approach, viewing the plain meaning of a statute's words as mandatory. This conflict is clearly evidenced by the manner in which the court of appeals began its interpretation of the statute: "First, to say that the legislature intended the state and its employees to be immune in the actual implementation of the decision to enforce a law would be to sanction and permit negligent and even reckless implementation of such a decision."[109]

The supreme court, on the other hand, objected to the plaintiffs' suggestion that its decision was prejudicial to the public interest. The court defended its position by stating its "interpretation does result in the grant of such immunity for losses that result from any act which can properly be characterized as enforcement of the law, but we do not regard this as being against the public interest, and it is clearly a matter that the Legislature may determine."[110]

The point of departure between the two appellate panels which considered this case is thus the degree to which each was willing to resort to judicial activism. The court of appeals approached the case with resolution of the public policy dispute as its main concern,[111] while the supreme court apparently regarded the public policy of separation of powers to be of overriding importance.[112] The supreme court's opinion resolves the public policy question in deference to the perceived legislative solution. Because both the court of appeals and the supreme court opinions may be justified by the application of traditional rules of statutory construction,[113] it is clear that if there is a

---

treatment of the constitutional issues on rehearing, see Johnson, *Constitutional Law, 1982 Survey of Recent Developments in Indiana Law*, 16 Ind. L. Rev. 101, 117 (1983).

[109]384 N.E.2d at 1186.

[110]428 N.E.2d at 204.

[111]*See supra* note 109 and accompanying text.

[112]*See supra* note 110 and accompanying text.

[113]*See generally* Ind. Code §§ 1-1-4-1, 1-1-4-2, 34-1-67-3 (1982); C. Sands, Statutes and Statutory Construction (4th ed. 1972) (revision of Sutherland Statutory Construction). The Indiana Supreme Court relied upon the "plain meaning" rule, 422 N.E.2d at 1226, and the "subsequent amendment" rule, *id.*, to find the word "enforcement" clear and unambiguous. The court's reliance on the plain meaning rule without discussion of the means utilized to arrive at its conclusion appears inappropriate in light of the carefully developed review of the common law offered by Judge Robertson's opinion for the First District Court of Appeals. 384 N.E.2d at 1181. *See* 2A C.

real "villain" in this dispute, that villain is the Indiana General Assembly.

The statute under consideration in this case is an inadequate attempt to address the issue of immunity in a law enforcement setting. In order to defer to the perceived legislative judgment on the public policy issue, the Indiana Supreme Court was forced to take a position which included rejection of the case law codification view and with it a carefully developed approach to the problem.[114] This rejection, as well as the precise holding of the court,[115] will cause many problems *even if* the supreme court has managed to reflect the legislative will with regard to the outcome of this particular case.

A. Three Problem Areas

The factual setting of the *Seymour National Bank* case was clear-cut, and the actual holding of the case was a very narrow one, that "an officer engaged in effecting an arrest is in fact enforcing a law."[116] Nonetheless, by rejecting the codification view, the *Seymour National Bank* decision makes it likely that numerous problems concerning the Tort Claims Act will surface. It is therefore important that the General Assembly act to clarify the statute so that these unforeseen problems may be alleviated.

1. The Stages of Law Enforcement.—The harshness which results

---

SANDS, *supra*, § 45.02, at 4. *But see* IND. CODE § 1-1-4-1(1) (1982). However, the subsequent amendment rule, used to attribute the same meaning of "enforcement" found in the 1976 amendment to the 1974 Tort Claims Act, was justified. *See* California School Township v. Kellogg, 109 Ind. App. 117, 125, 33 N.E.2d 363, 366 (1941); 2A C. SANDS, *supra*, § 49.11, at 265.

The court of appeals relied upon the rule that courts will not construe a statute in a manner which results in harsh or unjust consequences, 384 N.E.2d at 1186, and the rule that statutes in derogation of common law will be strictly construed, *id.* The derogation of common law rights rule was firmly established in American law even before the turn of the nineteenth century. Shaw v. Railroad Co., 101 U.S. 557, 565 (1879). The rule does not depend upon legislative intent; indeed, its application may very well frustrate legislative intent. For this reason, "[t]he rule of strict construction tends to be stated with greatest confidence where it is corroborated by other interpretive aids." 3 C. SANDS, *supra*, § 61.02, at 46. However, even without strong corroborative evidence, proponents argue that application of the rule is justified. Because the rule is so settled and familiar, it may be argued that the legislature acted with full knowledge that the courts would strictly construe the statute in question. 3 C. SANDS, *supra*, § 61.04, at 56. However, Indiana, like several other states, has enacted legislation indicating that this rule is inapplicable. IND. CODE § 34-1-67-3 (1982). *See, e.g.*, ARIZ. REV. STAT. ANN. § 1-211 (1974); ARK. STAT. ANN. § 27-131 (1979); KAN. STAT. ANN. § 77-109 (1977); KY. REV. STAT. ANN. § 446.080 (Baldwin 1969).

[114] *See supra* notes 32-38 and accompanying text.

[115] "[A]n officer engaged in effecting an arrest is in fact enforcing a law." 422 N.E.2d at 1226.

[116] *Id.*

from the supreme court's interpretation of the phrase "enforcement of a law" may well prompt attempts at distinguishing between acts in the various stages of the law enforcement process. It may be conceded that pursuing a suspected criminal involves the "enforcement" of a law. Much more difficult fact situations will be presented, however, when the courts are asked to consider whether an officer's negligent acts while on duty but merely patrolling are included with the term "enforcement." Similarly, the courts will likely have to determine whether negligent acts committed in the investigatory stage of the law enforcement process are cloaked with immunity. In that same vein, the *Seymour National Bank* decision provides little guidance as to what, if any, post arrest negligent acts will be included as protected state activity. For instance, if a crash similar to the one considered in *Seymour National Bank* takes place after a dangerous suspect has apprehended and is being whisked to the jailhouse, is "enforcement" still in progress? What if an officer's negligence in transporting the suspect from the police vehicle to the jail results in injury to innocent bystanders? Consider the situation in which injuries occur inside the jailhouse as a result of an officer's negligence before the cell door is closed behind the suspect. At what point is the arrest "effected"? In short, future challenges requiring the delineation of what acts, at what stages, of the law enforcement process are included in the term "enforcement" seem virtually certain.

2. Who are the "Enforcers"?—In various acts, the legislature has used the term "enforcement" to apply to the conduct of state employees engaged in several different types of activity. The *Seymour National Bank* decision suggests that the state could argue that employees, other than police officers, who are granted "enforcement" powers by the General Assembly are immune from liability for their acts in suits alleging misconduct on the part of these employees. The commissioner of labor,[117] pharmacy inspector-investigators,[118] the state fire marshal,[119] and local health officers[120] could all be protected for any conduct that they engaged in which was related to their "enforcement" duties. The lack of protection from the actual occurrence of negligent or reckless acts by these persons is exacerbated by the less rigorous training these persons are likely to receive compared to that provided to police officers.

3. Loopholes in the Act.—A literal reading of the Tort Claims Act could dangerously contract state immunity in areas that were clearly

---

[117]IND. CODE § 22-2-9-4 (1982) (commissioner enforces labor laws).

[118]*Id.* at § 25-26-13-4 (inspector-investigators enforce controlled substances laws).

[119]*Id.* at § 22-11-5-6 (fire marshal has duty to enforce all state laws and local ordinances).

[120]*Id.* at § 16-1-4-1 (local health officers have duty to enforce health laws).

protected under previous case law. Under section three subsection five of the Act, only the initiation of a judicial or administrative proceeding is expressly protected,[121] and under subsection six only the *performance* of a discretionary function triggers immunity.[122] The plain meaning of these sections, therefore, dictates that suits based upon the *failure* to initiate a proceeding or perform a discretionary function will lie.

B. Public Policy Considerations

The resolution of the public policy issue provided by the supreme court's interpretation of the Tort Claims Act does not seem to be the wisest solution available. A careful examination of the competing policy considerations indicates that something short of total immunity is clearly superior from a public policy standpoint. Those favoring the total immunity position apparently view the threat of suit as an obstacle to vigorous law enforcement. Although vigorous law enforcement is without doubt a laudable goal, the reasons why we want to encourage this should be kept foremost in mind. A civilized society where laws are obeyed provides for a safe, desirable life-style. Laws are enforced in order to protect citizens. If law enforcement is viewed as superior to protection of citizens from private injury, something has gone astray. Yet, state immunity for all law enforcement does exactly that; it prevents citizens who have been wronged by law "enforcers" from obtaining redress for their injuries.

The state's attorneys in *Seymour National Bank* responded to charges that private citizens are unprotected by arguing that the criminal penalties imposed by emergency vehicle statutes,[123] when coupled with disciplinary sanctions for violations of due care standards, are sufficient deterrents to negligent and reckless conduct, and that the imposition of civil liability is therefore unnecessary. This explanation ignores the fact, however, that the issue is not only how to avoid reckless and negligent acts, but also how to redress the injuries suffered when those acts do occur.

The total immunity view obviously makes no provision for those who are unfortunate enough to suffer injury as a result of law enforcement activity. Further, the state's contention evidences a rather unrealistic view of the deterrent effect of criminal actions against police officers, given the likelihood, from a practical standpoint, of vigorous prosecution of police offenders.

The public policy resolution reached in *Seymour National Bank* ignores the history of the doctrine of immunity and the reasons for

---

[121] *Id.* at § 34-4-16.5-3(5).

[122] *Id.* at 34-4-16.5-3(6) (emphasis added).

[123] *See id.* at § 9-4-1-25.

its subsequent drastic limitation. It was the harshness of the results visited upon individual plaintiffs which led to the development of distinctions that could mitigate the harshness of total state immunity.[124] It is certainly not difficult to imagine situations where extreme hardship could result under the supreme court's interpretation of the immunity provided law enforcement officials under the Indiana Tort Claims Act.

The facts of the *Seymour National Bank* decision provide ample evidence of potential hardship.[125] Further illustration is provided by Justice Hunter's description of a security guard's reckless act of running down innocent schoolchildren in a playground while in pursuit of a shoplifter.[126] That act, and countless others like it, would result in no liability on the part of the state or its employees and therefore no adequate means of redress for those victimized by the reckless conduct.

Such a result runs counter to the modern trend to spread losses among all of society. Because law enforcement is an activity which benefits *all* of society, it seems particularly appropriate to have the public at large share the cost of vigorous law enforcement.

C. Proposed Solution

The inclusion of a due care requirement for officers performing their duties, even under emergency situations, is a workable means of balancing the conflicting policies of encouraging vigorous law enforcement while at the same time protecting citizens from, and redressing them for, injuries suffered as a result of negligent or reckless acts of law enforcement officials. Such a course has been taken by a number of states.[127] Further, the inclusion of a due care requirement for law enforcement officials will not necessarily result in a decline of vigorous law enforcement. As discussed by the court of appeals and by Justice Hunter, jury consideration of alleged police negligence would be based upon instructions which would take into account the particular pressures placed upon law enforcement officials.[128]

---

[124]*See supra* notes 14-38 and accompanying text.

[125]The crash that is the center of the dispute in the *Seymour Nat'l Bank* case resulted in the death of two citizens and severe injury to a third. *See* Brief for Appellant at 7, Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979). No recovery at all was permitted to redress the injuries suffered by these citizens. Of course, it should be noted that it is unclear whether the trooper was actually negligent in this case, and such was obviously never litigated.

[126]422 N.E.2d at 1228 (Hunter, J., dissenting).

[127]*See, e.g.,* CAL. GOV'T CODE § 820.4 (West 1980).

[128]The court of appeals opinion stressed that traditional negligence principles would apply and that the trier of fact would judge whether the defendant's actions comported with those an ordinary, prudent person would exercise under the same or similar

In light of the foregoing discussion, the course set out by Judge Robertson of the court of appeals, which continued the Indiana case law development of the parameters for liability of state officials, would seem to be the better way to resolve the difficult issues involved in the law enforcement setting. Under the case law analysis, a plaintiff injured by a government officer could state a cause of action if the plaintiff could show that "(1) the officer was acting in a ministerial capacity; or (2) the officer owed a private duty to the plaintiff to exercise due care."[129] The General Assembly should respond to the *Seymour National Bank* decision and make it clear that the State of Indiana is concerned with the welfare of all of its citizens, including those tortiously injured by law enforcement officers.

V. Conclusion

The *Seymour National Bank* decision has had a substantial impact upon the public policy of Indiana with regard to the relative weight given to the factors involved in balancing the public's concurrent needs for vigorous law enforcement and protection from injuries suffered as a result of negligent law enforcement. In the aftermath of the *Seymour National Bank* decision, Indiana law is unsettled as to the scope of immunity provided by the General Assembly, both with respect to what particular activities are protected, and precisely *whose* activities are immunized.

The *Seymour National Bank* decision reinstates the view that individual injured citizens should bear the entire burden of the Indiana General Assembly's policy favoring vigorous law enforcement. In short, "[w]e have, it appears, returned full circle to the anachronistic notion that 'the King can do no wrong,' for the [supreme court] majority's literal application of the statute means citizens have no recourse in law for a loss sustained at the hands of a governmental employee 'enforcing' a law."[130]

It is unlikely that Indiana law enforcement officials will have any more success shouldering this responsibility than did their royal predecessors. For this reason, the General Assembly should adopt the more equitable modern approach of requiring due care in the course

---

circumstances. The court stated that the particular circumstances involved in cases such as *Seymour Nat'l Bank* might include "the probability of harm to third persons and the gravity of an injury that would result therefrom, the availability of assistance by other police units, and the severity of the criminal conduct of the suspected felon." 384 N.E.2d at 1187. Justice Hunter approved of these considerations in his dissenting opinion, but added that he would include injuries suffered by third persons at the hand of the criminal suspect within the harm referred to in the court of appeals' "probability of harm" consideration. 422 N.E.2d at 1229 (Hunter, J., dissenting).

[129]384 N.E.2d at 1183.

[130]422 N.E.2d at 1227 (Hunter, J., dissenting).

of law enforcement. Should the General Assembly decline to act, the courts should limit the *Seymour National Bank* decision to those situations where the plain meaning analysis is appropriate—where *police* officers are actually in the process of *effecting* an arrest. The courts, in the face of legislative refusal to mitigate the harshness of the immunity doctrine, should limit the *Seymour National Bank* decision to its facts and muster the courage to define Indiana public policy in favor of requiring our very human law enforcement officials to execute due care in the performance of their duty.

RICHARD L. RANDALL

Tibbs v. Florida: The Weight-Sufficiency Distinction Gains Too Much Weight

I. Introduction

A principle which has long been accepted in American jurisprudence is that the double jeopardy clause[1] prevents the retrial of a criminal defendant once he has been acquitted in the trial court.[2] Whether the double jeopardy clause prevents the retrial of a defendant who is convicted, but whose conviction is later reversed by an appellate court, is a question which has generated a number of Supreme Court decisions narrowly construing the double jeopardy clause's prohibition against successive trials for the same offense.[3] These decisions unanimously permitted a defendant's retrial if the defendant had been successful in getting his conviction reversed.[4]

In 1978 the Supreme Court expounded a broader view of the purpose of the double jeopardy clause with its decision in *Burks v. United States.*[5] In *Burks*, the Court held that a defendant cannot be retried after his conviction is reversed because of insufficient evidence.[6] This decision had the effect of putting appellate reversals for insufficient evidence on the same level as trial court acquittals.

Recently, the Supreme Court has narrowly limited its holding in *Burks*. In *Tibbs v. Florida*,[7] the Court held that a retrial does not violate the double jeopardy clause when an appellate court reverses a defendant's conviction on the ground that the verdict is against the weight of the evidence.[8] The Court's weight-sufficiency distinction in *Tibbs* is superficially consistent with the holding in *Burks*, which is

---

[1]U.S. Const. amend. V provides in part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

[2]See United States v. Ball, 163 U.S. 662 (1896), where the Supreme Court held that a "verdict of acquittal was final, and could not be reviewed, . . . without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." *Id.* at 671. *See also* United States v. Scott, 437 U.S. 82 (1978); Arizona v. Washington, 434 U.S. 497 (1978); North Carolina v. Pearce, 395 U.S. 711 (1969); Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam); Kepner v. United States, 195 U.S. 100 (1904).

[3]*See, e.g.*, Forman v. United States, 361 U.S. 416 (1960); Bryan v. United States, 338 U.S. 552 (1950); United States v. Ball, 163 U.S. 662 (1896).

[4]*See* cases cited *supra* note 3.

[5]437 U.S. 1 (1978). One case has noted that "[i]n 1977 and 1978 . . . the Supreme Court broadened the scope of [a] defendant's double jeopardy protection . . . ." Lydon v. Justices of Boston Mun. Court, 698 F.2d 1, 3 (1st Cir. 1982) (referring to Burks v. United States, 437 U.S. 1 (1978) and Jackson v. Virginia, 443 U.S. 307 (1979)).

[6]437 U.S. at 18.

[7]457 U.S. 31 (1982).

[8]*Id.* at 32.

limited to reversals for insufficient evidence.[9] However, the added significance which *Tibbs* gives to the weight-sufficiency distinction is inconsistent with the broader view of the purposes underlying the double jeopardy clause expressed in *Burks*.[10] The effect of *Tibbs* is to place a reversal based on the weight of the evidence on the same level as a reversal based on trial error.

This Note questions the validity of placing weight reversals on the same level as trial error reversals in a double jeopardy context. The focus of this Note will be on whether the weight-sufficiency distinction is a proper line of demarcation in making a determination of which defendants will be acquitted and which defendants will be retried. Particularly, this Note will call into question the ability of appellate courts to make clear-cut decisions about how much evidence satisfies the sufficiency of the evidence standard, how much satisfies the weight of the evidence standard, and the difficulty inherent in making an objective determination one way or the other when a decision means either retrial or acquittal.

II. BACKGROUND: *Tibbs* IN CONTEXT

A. The Flawed Analysis Prior to Burks

1. Trial Error v. Sufficiency Reversals.—The pre-*Burks* decisions had unanimously permitted the retrial of a defendant who had succeeded in getting his conviction set aside.[11] However, as *Burks* recognized, these prior decisions suffered from two essential flaws in reasoning. The first was the Court's failure to distinquish reversals based on trial error from reversals based on insufficient evidence.[12] A trial error reversal, according to *Burks*, "implies nothing with respect to the guilt or innocence of the defendant"[13] nor does it "constitute a decision to the effect that the government has failed to prove

---

[9]437 U.S. at 5. *See also* United States v. DiFrancesco, 449 U.S. 117, 131 (1980).

[10]In *Burks*, the Court stated:

> The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."

437 U.S. at 11 (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

[11]*See, e.g.*, Forman v. United States, 361 U.S. 416 (1960); Bryan v. United States, 338 U.S. 552 (1950); *cf.* Sapir v. United States, 348 U.S. 373 (1955) (per curiam) (Court did not permit retrial but did not pass upon the double jeopardy question).

[12]437 U.S. at 14-15. The Court stated that "the failure to make this distinction [between trial error and insufficient evidence] has contributed substantially to the present state of conceptual confusion existing in this area of the law." *Id.* at 15.

[13]*Id.*

its case."[14] Rather, such a reversal indicates merely that the defendant was convicted through a defective judicial process.[15] A retrial following such a reversal benefits both the defendant and society. A retrial benefits the defendant inasmuch as it permits him to obtain a fair adjudication of his innocence or guilt in a proceeding free from error.[16] A retrial benefits society in that it prevents a guilty defendant from escaping punishment merely because a trial error disrupted the first proceeding.[17]

But the same rationale does not apply to a reversal based on insufficient evidence. A reversal in that circumstance "means that the government's case was so lacking that it should not have even been *submitted* to the jury."[18] Thus, when an appellate court reverses a decision because of insufficient evidence, the appellate court is saying that the prosecution has failed to prove its case beyond a reasonable doubt and that, as a matter of law, the jury could not have returned a guilty verdict.[19] While some writers had long-favored such a distinction,[20] *Burks* marked the first time that the Court considered it to be a constitutional necessity.

---

[14]*Id.*

[15]*Id.*

[16]*Id.* Of course, an argument can be made that retrial should be barred even where the reversal results from trial error. See Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal*, 8 IND. L. REV. 497 (1975), where the author asserts:

> The underlying policy of the double jeopardy clause is to preclude multiple prosecutions for the same offense without regard to the question of guilt. If it is indeed true that in criminal prosecution the Government assumes the risks of all the errors of the prosecuting attorney and the trial judge, the ground for reversal would be immaterial.

Id. at 506 n.24. *See generally* Comment, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. CHI. L. REV. 365 (1964) [hereinafter cited as Comment, *Double Jeopardy*].

[17]437 U.S. at 15. The Court recognized that " '[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.' " *Id.* (quoting United States v. Tateo, 377 U.S. 463, 466 (1964)).

[18]437 U.S. at 16. The standard for determining the sufficiency of the evidence is the same regardless of whether it is the trial court or the appellate court which is making the determination. 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURES § 467, at 655-56 (1982). That standard is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

[19]437 U.S. at 16.

[20]*See* Thompson, *supra* note 16, at 519-20; Note, *Double Jeopardy: The Prevention of Multiple Prosecutions*, 54 CHI.[-]KENT L. REV. 549 (1977); Comment, *Double Jeopardy*, *supra* note 16, at 370-72. See also the concurring opinion in Sapir v. United States, 348 U.S. 373 (1955) (per curiam), where Justice Douglas stated that, "[i]f . . . the trial judge . . . render[s] a verdict of acquittal, the guarantee against double jeopardy would

2. The Waiver Theory.—The second area of flawed reasoning existing prior to *Burks* centered around the Court's reliance on the waiver theory. Under this theory, a defendant seeking reversal of his conviction was said to have waived his double jeopardy defense to retrial by taking affirmative steps to have his conviction set aside.[21] Two related principles tended to support this theory. The first was an appellate court's broad statutory authority to order further proceedings as may have been necessary and just under the circumstances.[22] Second was a defendant's procedural maneuver of accompanying his motion for a judgment of acquittal with an alternative motion for a new trial.[23] So, the argument went, by remanding for a second trial, the appellate court ordered the only just relief and merely gave the defendant/appellant what he had asked for.

Burks soundly rejected the waiver theory, holding that, whether or not a defendant has moved for a new trial, he cannot be retried when his conviction is reversed because of insufficient evidence.[24]

---

prevent a new trial of the old offense. I see no difference when the appellate court orders a judgment of acquittal for lack of evidence." 348 U.S. at 374 (Douglas, J., concurring).

[21]*See, e.g.*, Bryan v. United States, 338 U.S. 552, 560 (1950) (citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947)). For a critical discussion of the waiver theory, see Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 U.C.L.A. L. REV. 81 (1967); Comment, *Double Jeopardy*, *supra* note 16, at 367-72.

[22]28 U.S.C. § 2106 (1976) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

[23]*See, e.g.*, Yates v. United States, 354 U.S. 298, 328 (1957) (court may remand criminal cases for retrial even where the evidence is deemed "palpably insufficient" if the defendant asked for a new trial in the alternative). Even Justice Douglas' concurring opinion in Sapir v. United States, 348 U.S. 373 (1955) (per curiam), which was the first indication that at least one Justice would be willing to use double jeopardy principles to prevent a retrial after an appellate court finding of insufficient evidence, stated that a defendant who asks for a new trial is not protected against double jeopardy, "for then the defendant opens the whole record for such disposition as might be just." 348 U.S. at 374 (Douglas, J., concurring).

[24]437 U.S. at 17-18. The underlying fallacy of the waiver theory is well stated in Note, *Double Jeopardy: When is an Acquittal an Acquittal?*, 20 B.C.L. REV. 925 (1979) [hereinafter cited as Note, *Acquittal*]:

> Under the waiver theory, a defendant would have to refrain from making a new-trial motion when challenging evidentiary sufficiency on appeal if the defendant were to be sure of avoiding a second trial following a successful appeal. . . . [U]nder normal circumstances one would expect a realistic defendant to seek any relief possible, including a new trial. . . . [T]he "waiver" theory presumes an element of volition on the part of the defendant. . . . Frankly, it is hard to imagine that, as a rule, defendants knowingly weigh the risks of reprosecution when new-trial motions are made in their behalf.

Id. at 947.

B. Burks v. United States

In *Burks*,[25] the defendant was convicted of robbing a federally insured bank. On appeal, the Sixth Circuit Court of Appeals reversed the conviction on the ground that the prosecution's evidence, even when considered in the light most favorable to the government, did not rebut Burks' proof of insanity.[26] The court then remanded the case to the district court for a determination of whether the defendant should be acquitted or retried.[27] On appeal the Supreme Court reversed and, in a unanimous opinion written by Chief Justice Burger, held that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient."[28] The Court reasoned that an appellate reversal for insufficient evidence is tantamount to a jury verdict of acquittal and should be accorded the same finality.[29] This decision substantially changed the law as it stood at that time.[30]

Although *Burks* is noteworthy for having placed appellate reversals on the same level as trial court acquittals,[31] it is perhaps most striking for its use of broad double jeopardy language. In supporting its conclusions, the Court in *Burks* expounded principles which suggested that the double jeopardy clause, at least in the context of appellate reversals, had been given a renewed vitality, free from any procedural niceties[32] that might impair its protection. The Court stated:

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State

---

[25]437 U.S. 1 (1978). For a more detailed analysis of *Burks*, see Comment, *Constitutional Law—Fifth Amendment—Double Jeopardy Implications of Appellate Reversal for Insufficient Evidence*—Burks v. United States, 25 N.Y.L. Sch. L. Rev. 119 (1979). *See also* Note, *Acquittal*, *supra* note 24; Note, Burks v. United States: *Redrawing the Lines in Double Jeopardy*, 1979 Det. C.L. Rev. 193 (1979); Note, *Constitutional Criminal Law—Double Jeopardy—Appellate Court Acquittal Accorded Same Finality as Trial Court Acquittal; Retrial Permitted After Defendant Seeks Dismissal*, 53 Tul. L. Rev. 598 (1979).

[26]United States v. Burks, 547 F.2d 968, 970 (6th Cir. 1976), *rev'd*, 437 U.S. 1 (1978).

[27]Prior to *Burks*, courts routinely sent the case back to the trial court after a finding of insufficient evidence. *See supra* notes 3-4 and accompanying text.

[28]437 U.S. at 18.

[29]*Id.* at 16.

[30]*See supra* notes 11-24 and accompanying text.

[31]It is beyond contention that a defendant acquitted in the first instance, that is, in the trial court, may not constitutionally be retried. *See* United States v. Scott, 437 U.S. 82 (1978); North Carolina v. Pearce, 395 U.S. 711 (1969); Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam); Green v. United States, 355 U.S. 184 (1957); Kepner v. United States, 195 U.S. 100 (1904); United States v. Ball, 163 U.S. 662 (1896).

[32]*See supra* notes 11-24 and accompanying text.

> . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy'was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."[33]

Additionally, the Court expressed concern that "the purposes of the Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.' "[34]

A clear picture of these historical strands which preceded *Burks*, and which *Burks* untangled to some extent, is necessary to an understanding of what occurred in *Tibbs*. At least two things were clear when *Tibbs* went before the Supreme Court. First, the difference between trial error and insufficient evidence meant the difference between constitutionally permissible retrial and constitutionally impermissible retrial.[35] Second, a defendant who sought a reversal of his conviction and asked for a new trial in the alternative was not always desirous of undergoing a second trial.[36] *Burks*, however, did not decide the effect of a reversal based on the weight of the evidence.

C. Examination of Double Jeopardy Principles and Evidentiary Standards

1. Double Jeopardy.—Although this Note makes no attempt to delineate the rather complex history of double jeopardy and its underlying policy rationale, some discussion of recurring themes is necessary.[37]

A literal reading of the double jeopardy clause may convey the notion that all retrials of a criminal defendant, regardless of how they arise, are violative of the constitution. Judicial interpretations of the clause, while never explicitly going this far, may produce the same

---

[33]437 U.S. at 11 (footnote omitted) (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

[34]437 U.S. at 17.

[35]*Id.* at 15-16.

[36]*Id.* at 17.

[37]Of course, a tremendous body of authority exists in the area of double jeopardy. For a varied view of its purpose, see United States v. Scott, 437 U.S. 82 (1978); United States v. Wilson, 420 U.S. 332 (1975); Green v. United States, 355 U.S. 184 (1957); United States v. Ball, 163 U.S. 662 (1896); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873). *See also* Thompson, *supra* note 16, at 502-07; Note, *Double Jeopardy: The Prevention of Multiple Prosecutions*, 54 CHI.[-]KENT. L. REV. 549 (1977); Comment, *Double Jeopardy*, *supra* note 16; Recent Development, *Emerging Standards in Supreme Court Double Jeopardy Analysis*, 32 VAND. L. REV. 609 (1979); Note, *Twice in Jeopardy*, 75 YALE L. J. 262 (1965). *See generally* J. SIGLER, DOUBLE JEOPARDY ch. 1 (1969) (tracing elaborately the development of double jeopardy principles in Anglo-American law).

notion.[38] Usually, however, a court will balance what it believes to be the purpose of the double jeopardy clause with other societal interests[39] to determine whether the double jeopardy clause applies.

The double jeopardy clause has varying, interrelated purposes. It is designed to protect the defendant from the expense, embarrassment and strain of a second trial.[40] Additionally, the clause is designed to prevent the insecurity which a defendant must undergo when a second trial is ordered.[41] Finally, the clause is designed to prevent the state, with its superior resources, from wearing down the defendant so that a defendant is not convicted simply because of repeated governmental attempts at prosecution.[42]

While these purposes appear broad enough to preclude all second trials, the courts have recognized other countervailing interests and have refused to apply the double jeopardy clause so as to prevent all second trials.[43] An example of this recognition is found in the statement:

> Undeniably the framers of the Bill of Rights were concerned to protect defendants from oppression and from efforts to secure, through the callousness of repeated prosecutions, convictions for whose justice no man could vouch. On the other hand, they were also aware of the *countervailing interest* in the vindication of criminal justice, which sets outer *limits to the protections for those accused of crimes.*[44]

---

[38]*See, e.g.*, Green v. United States, 355 U.S. 184 (1957). Justice Black, writing for the majority in *Green*, stated:

> The underlying idea [of double jeopardy], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88.

[39]A concise discussion of this balancing process is found in Note, *Acquittal*, *supra* note 24, at 948-49.

[40]Green v. United States, 355 U.S. 184, 187-88 (1957).

[41]*Id. See* Note, *Acquittal*, *supra* note 24, at 949.

[42]Green v. United States, 355 U.S. 184, 187-88; *see also* Burks v. United States, 437 U.S. 1, 11 (1978) (the clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding).

[43]The Supreme Court has recognized that judicial decisions do not go as far as the language of the double jeopardy clause might permit. In Crist v. Bretz, 437 U.S. 28 (1978), Justice Stewart, writing for the majority, noted that "[t]he Double Jeopardy Clause of the Fifth Amendment is stated in brief compass . . . . But this deceptively plain language has given rise to problems both subtle and complex, problems illustrated by no less than eight cases argued here this very Term." *Id.* at 32 (footnote omitted).

[44]Green v. United States, 355 U.S. 184, 218-19 (1957) (Frankfurter, J., dissenting)

Until *Burks v. United States*,[45] these countervailing interests were considered sufficiently great to permit a defendant's retrial after he had succeeded in getting his conviction reversed on appeal.[46] *Burks* recognized that the purposes of the double jeopardy clause outweighed other societal interests where a defendant's conviction is reversed because of insufficient evidence. The Court left until a later decision the impact of these societal interests on a conviction which is reversed because of the weight of the evidence.

2. Weight and Sufficiency.—In *Tibbs v. Florida*,[47] the Supreme Court decided that the distinction between a reversal based on the sufficiency of the evidence and a reversal based on the weight of the evidence is important enough to prohibit retrial after one, while permitting retrial after the other.[48]

Theoretically, an appellate court is faced with differing considerations when reversing because of insufficent evidence on the one hand, and reversing because of the weight of the evidence on the other.[49] A defendant in a federal district court challenges the sufficiency of the evidence by making a Rule 29 motion for judgment of acquittal.[50] The standard for passing on such a motion requires that the court view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.[51] The standard is the same

---

(emphasis added). *See also* Wade v. Hunter, 336 U.S. 684, 689 (1949) (a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments).

[45]437 U.S. 1 (1978).

[46]*See* North Carolina v. Pearce, 395 U.S. 711 (1969); Forman v. United States, 361 U.S. 416 (1960); Yates v. United States, 354 U.S. 298 (1957); Bryan v. United States, 338 U.S. 552 (1950); United States v. Ball, 163 U.S. 662 (1896).

[47]457 U.S. 31 (1982).

[48]*Id.* at 32.

[49]3 C. WRIGHT, *supra* note 18, § 553, at 245.

[50]FED. R. CRIM. P. 29(a) states in part:

> The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

If the jury has already been discharged or has already returned a verdict, Rule 29(c) applies.

For the purposes of this discussion, the weight and the sufficiency of the evidence are examined in the context of the Federal Rules of Criminal Procedure. The states may vary in their treatment of the weight and the sufficiency of the evidence. For example, some states do not permit their appellate tribunals to reweigh the evidence addressed at the trial. *See, e.g.*, Tibbs v. State, 397 So. 2d 1120, 1125 (Fla. 1981) (Florida law).

[51]Jackson v. Virginia, 443 U.S. 307, 319 (1979).

for both the trial court and the appellate court.[52] An appellate court's determination that the evidence is insufficient to sustain the conviction means that the government's case was so lacking that it should never have been sent to a jury.[53] When passing on a motion for judgment of acquittal, the reviewing court is not to substitute its judgment of what the verdict should be for that of the jury.[54] Thus, the court may not weigh the evidence or assess the credibility of the witnesses because such a weighing process is the jury's function.[55]

An appellate weighing process does occur, however, when a defendant challenges the validity of his conviction on the grounds that it is against the weight of the evidence. A defendant seeking this relief must make a Rule 33 motion for a new trial.[56] The court passing on the Rule 33 motion has much broader discretion than does the court passing on a motion for a judgment of acquittal. The court may weigh the evidence and consider the credibility of witnesses, and the court need not view the evidence in the light most favorable to the prosecution.[57] This standard differs from the standard used when passing on a motion for a judgment of acquittal:

> The question is not whether the defendant should be acquitted outright, but only whether he should have a new trial. . . . If the court concludes that, despite the abstract sufficiency of the evidence . . . the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.[58]

The defendant making a motion for a new trial faces a heavy burden because the power to grant a new trial is "invoked only in exceptional cases in which the evidence preponderates heavily against the verdict."[59]

---

[52]2 C. WRIGHT, *supra* note 18, § 467, at 655-56; *see also* United States v. Lincoln, 630 F.2d 1313, 1316-17 (8th Cir. 1980).

[53]Burks v. United States, 437 U.S. 1, 16 (1978).

[54]Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); Burks v. United States, 437 U.S. 1, 16 (1978).

[55]2 C. WRIGHT, *supra* note 18, § 467, at 663.

[56]FED. R. CRIM. P. 33 provides in part that "[t]he court on motion of a defendant may grant a new trial to him if required in the interest of justice."

[57]*See* 3 C. WRIGHT, *supra* note 18, § 553, at 245-46.

[58]United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980). It is often said that the court acts as a "thirteenth juror" in such an instance. *See* 3 C. WRIGHT, *supra* note 18, § 553, at 247; United States v. Turner, 490 F. Supp. 583, 593 (E.D. Mich. 1979), *aff'd*, 633 F.2d 219 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

[59]3 C. WRIGHT, *supra* note 18, § 553, at 248; *see, e.g.*, Harper v. United States, 296 F.2d 612 (9th Cir. 1961) (new trial not required even where judge disagreed with jury on credibiliity of principal prosecution witness).

This background discussion shows the various competing considerations present when *Tibbs* came before the Court: the sufficiency of the evidence rule laid down in *Burks*; the balancing process which courts use to determine whether the double jeopardy clause precludes retrial; and the weight-sufficiency distinction governing appellate reversals, perhaps insignificant until *Burks*.[60]

II. *Tibbs:* Variation on a Double Jeopardy Theme

A. Factual and Procedural History

Delbert Tibbs was tried on a three-count indictment charging rape, first degree murder, and felony murder. The jury in a Florida trial court found Tibbs guilty of all three. The Florida Supreme Court reversed the conviction,[61] enumerating six infirmities in the trial court's decision which left the supreme court with "considerable doubt that . . . Tibbs [was] the man who committed the crimes for which he [was] convicted."[62] The court reversed pursuant to a Florida procedural rule which made obligatory the supreme court's review of a conviction for which the death sentence was imposed.[63] Under this rule, the court was to review the evidence on the entire record to determine whether "the interests of justice" required a new trial.[64] Significantly, the supreme court, at the time, gave no indication of the basis for its reversal; that is, the court did not state whether it was reversing

---

[60]See Tibbs v. State, 397 So. 2d 1120, 1122 (Fla. 1981), where the Florida Supreme Court stated that "the distinction between an appellate reversal based on evidentiary weight and one based on evidentiary sufficiency was never of any consequence until *Burks*."

[61]Tibbs v. State, 337 So. 2d 788 (Fla. 1976). This decision is referred to as *Tibbs I*.

[62]*Id.* at 790. The infirmities which the court listed were: first, the prosecution's complete failure, apart from the testimony of the prosecutrix, to place Tibbs anywhere near the scene of the crimes on the date in question; second, the failure to find the truck which Tibbs was allegedly driving at the time the crimes were committed; third, the failure to find a gun (the alleged murder weapon) or car keys in Tibbs' possession, at the scene of the crime, or anywhere else; fourth, Tibbs' full cooperation with the police during the investigatory process; fifth, the prosecution's failure to introduce any testimony casting doubt on Tibbs' veracity, coupled with the fact that Tibbs had no prior criminal record; and finally, the prosecutrix's damaged credibility, resulting from several inconsistencies in her testimony as well as from her admission that she used marijuana throughout the day of, and immediately prior to the crimes. *Id.* at 790-91.

[63]Fla. R. App. P. 6.16(b), Florida Rules of Court (West 1976), provided in part: "Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not." The rule has been substantively recodified since the *Tibbs* decision. *See* Fla. R. App. P. 9.140(f).

[64]Fla. R. App. P. 6.16(b), Florida Rules of Court (West 1976).

because of insufficient evidence or because the verdict was contrary to the weight of the evidence. Citing defects in the prosecutor's case,[65] the court reversed and ordered a new trial "[r]ather than risk the very real possibility that Tibbs had nothing to do with [the] crimes."[66] A concurring opinion indicated that the weakness of the evidence against Tibbs might require that he be released without further litigation.[67]

The trial court, on remand, balked at the idea of retrying Tibbs because, in the interim, the United States Supreme Court decided that the double jeopardy clause precludes the retrial of a defendant whose conviction is later reversed because of insufficient evidence.[68] A Florida appellate court disagreed,[69] holding the *Burks* rationale inapplicable where a conviction is reversed because an appellate court finds that it is against the weight of the evidence.[70] The Florida Supreme Court affirmed the appellate court's decision and again remanded the case for retrial.[71]

The United States Supreme Court, in a 5-4 decision written by Justice O'Connor, affirmed the Florida Supreme Court's decision and held that where a reversal is based on the weight, rather than the sufficiency, of the evidence, a retrial is not barred by the double jeopardy clause.[72] Hence, Delbert Tibbs was once again sent back to the trial court to await a new trial.

B. The Supreme Court's Holding and Analysis

In *Tibbs v. Florida*,[73] the Supreme Court was presented with the issue of "whether the Double Jeopardy Clause bars retrial after a state appellate court sets aside a conviction on the ground that the verdict was against 'the weight of the evidence.' "[74] The Court found that "[a]fter examining the policies supporting the Double Jeopardy Clause, we hold that a reversal based on the weight, rather than the sufficiency, of the evidence permits the State to initiate a new prosecution."[75]

---

[65]*See supra* note 62.

[66]337 So. 2d at 791.

[67]*Id.* at 792. (Boyd, J., concurring specially). Justice Boyd reluctantly concurred in the majority opinion providing for a new trial because of his understanding that Florida law permitted such a new trial. *Id.*

[68]Burks v. United States, 437 U.S. 1 (1978). Green v. Massey, 437 U.S. 19 (1978), was decided the same day as *Burks* and made *Burks* applicable to the states.

[69]State v. Tibbs, 370 So. 2d 386 (Fla. Dist. Ct. App. 1979).

[70]*Id.* at 388.

[71]Tibbs v. State, 397 So. 2d 1120 (Fla. 1981). This case is referred to as *Tibbs II*.

[72]Tibbs v. Florida, 457 U.S. 31 (1982).

[73]457 U.S. 31 (1982).

[74]*Id.* at 32 (footnote omitted).

[75]*Id.*

The Court began its analysis of the problem by noting that *Burks v. United States*[76] "carved a narrow exception" to the general rule that the double jeopardy clause does not protect a defendant who has succeeded in getting his first conviction set aside.[77] The Court stated that this exception—that a defendant whose conviction is reversed because of legally insufficient evidence may not be retired—rests on two closely related policies.[78] The first policy is the special weight which the double jeopardy clause attaches to judgments of acquittal.[79] In *Burks*, the Court held that an appellate reversal for insufficient evidence meant that the jury should never have been given the case for determination, as acquittal was the only proper verdict.[80] Because a jury's verdict of acquittal is final, the Court reasoned, a decision that the jury could not have returned any verdict other than acquittal is also final.[81]

The Court in *Tibbs* stated that the second policy supporting the *Burks* exception concerned the principle that " '[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' "[82] Justice O'Connor, writing for the majority in *Tibbs* elaborated on this principle: "This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance."[83]

Although this language appears to include retrials after weight reversals as well as retrials after insufficiency reversals, the majority opinion in *Tibbs* read *Burks* as permitting retrial under the circumstances. The Court, relying on dictum in a case decided in the previous term, held that the two policies supporting the *Burks* principle "do not have the same force when a judge disagrees with a jury's resolution of conflicting evidence and concludes that a guilty verdict is against the weight of the evidence."[84] The Court gave two bases

---

[76]437 U.S. 1 (1978).

[77]457 U.S. at 40.

[78]*Id.* at 41.

[79]*Id.* (citing United States v. DiFrancesco, 449 U.S. 117, 129 (1980); United States v. Scott, 437 U.S. 82, 91 (1978); Arizona v. Washington, 434 U.S. 497, 503 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam)).

[80]437 U.S. at 16.

[81]457 U.S. at 41 (citing Burks v. United States, 437 U.S. 1, 11 (1978)).

[82]457 U.S. at 41 (quoting Burks v. United States, 437 U.S. 1, 11 (1978)).

[83]457 U.S. at 41.

[84]*Id.* at 42 (citing Hudson v. Louisiana, 450 U.S. 40, 44-45 n.5 (1981)). In the footnote cited, the Court in *Hudson* stated that it was not deciding

whether the Double Jeopardy Clause would have barred [the state] from re-

for its conclusion. First, the Court held that a reversal based on the weight of the evidence does not mean that acquittal was the only proper verdict. Rather, such a reversal means only that the appellate court, which sits as a "thirteenth juror," disagrees with the jury's resolution of conflicting evidence.[85] Thus, the Court held, an appellate court's reversal based on the weight of the evidence means nothing more than a disagreement among the jurors themselves.[86] The Court then referred to its long-standing rule of permitting retrial following a deadlocked jury.[87]

As a second basis for its conclusion that the double jeopardy clause does not have the same force when a reversal is based on the weight of the evidence, the Court reasoned that a weight reversal can occur only after the state has both presented sufficient evidence to support conviction and has persuaded the jury to convict.[88] The Court failed to note that the jury has also been convinced when a conviction is reversed because of insufficient evidence.

In the course of its opinion, the Court in *Tibbs* suggested two interrelated benefits which a defendant would derive from the Court's holding. First, a state may choose whether or not it will permit its appellate courts to reweigh evidence; if a reversal based on of the weight of the evidence had the effect of precluding retrial of a defendant, then a state may simply prohibit its appellate courts from reweighing the evidence.[89] Thus, the Court's holding in *Tibbs* supposedly increases the likelihood of the defendant's conviction being reversed because states will be more willing to permit the weight of the evidence to remain as a ground for reversal. Secondly, the Court stated that a reversal based on the weight of the evidence "simply affords the defendant a second opportunity to seek a favorable judgment."[90]

> trying [the defendant] if the trial judge had granted a new trial in [his] capacity [as "thirteenth juror"], for that is not the case before us. We note, however, that *Burks* precludes retrial where the State has failed as a matter of law to prove its case despite a fair opportunity to do so. By definition, a new trial ordered by a trial judge acting as a "13th juror" is not such a case. Thus, nothing in *Burks* precludes retrial in such a case.

450 U.S. at 44-45 n.5 (citation omitted). The Court did not discuss the effect of an appellate tribunal's reweighing of the evidence.

[85]457 U.S. at 42. *See generally* 3 C. WRIGHT, *supra* note 18, § 553.

[86]457 U.S. at 42.

[87]*Id.* Of course, strong double jeopardy arguments can be made against permitting retrial following a hung jury. At least one author has severely criticized the Court's holdings in this area. *See* Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem,* 129 U. PA. L. REV. 701 (1981).

[88]457 U.S. at 42-43.

[89]*Id.* at 45 n.22. The Court stated: "We note that a contrary rule, one precluding retrial whenever an appellate court rests reversal on evidentiary weight, might prompt state legislatures simply to forbid those courts to reweigh the evidence." *Id.*

[90]*Id.* at 43.

Finally, the Court rejected the contention that the distinction between the weight and sufficiency of the evidence "will undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence."[91] The Court rejected this contention for two reasons. First, the Court placed confidence in the ability of appellate judges to apply correctly the two evidentiary standards.[92] Second, the Court stated that the *Jackson v. Virginia* test for the sufficiency of the evidence imposes a "limit on an appellate court's definition of evidentiary sufficiency."[93] The *Jackson v. Virginia* test is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[94]

After examining these policies, the Court concluded that the double jeopardy clause does not bar retrial under the circumstances.

C. Burks *Limited: The Court Restricts Double Jeopardy Applicability in the Context of Appellate Reversals*

1. Trial Error v. Weight Reversals.—An analysis of the Supreme Court's reasoning in *Tibbs* reveals several problems with making the weight-sufficiency distinction a constitutional dichotomy. The majority opinion in *Tibbs* read *Burks* as permitting retrial where a conviction is reversed because of evidentiary weight.[95] The Court placed great emphasis on the fact that the holding in *Burks* did not go beyond prohibiting retrial in the limited circumstance of an insufficiency reversal.[96] Actually, *Burks* provides no clear answer of how to treat an appellate reversal which is based on the weight of the evidence rather than the sufficiency of the evidence. There is a slight semantic, yet great substantive difference in saying, on the one hand, that *Burks* decided *that only* appellate reversals for insufficient evidence invoke the protection of the double jeopardy clause, and saying, on the other, that *Burks* decided *only that* appellate reversals for insufficient evidence invoke double jeopardy's protections. Under the first reading, double jeopardy is not invoked unless the defendant is acquitted or has his conviction set aside because of what is later determined to be legally insufficient evidence. Under the second reading, retrial is barred following a sufficiency reversal, and may also be

---

[91] *Id.* at 44.

[92] *Id.* at 44-45.

[93] *Id.* at 45 (footnote omitted).

[94] 443 U.S. 307, 319 (1979).

[95] 457 U.S. at 40-45.

[96] *Id.* at 40. The Court stated that *Burks* "carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial." *Id.*

barred under circumstances which the Court did not pass upon at that time. Given the fact that the Court in *Burks* discussed only trial error and insufficient evidence in its opinion, the latter reading seems more plausible.[97] Thus, the exception carved by *Burks* need not be as narrow as the Court in *Tibbs* held it to be.

Further, distinguishing trial error reversals from sufficiency reversals presents fewer conceptual difficulties than does distinguishing sufficiency reversals from weight reversals. A reversal for trial error does not require that in a retrial, the prosecution must hone its trial strategies in order to find a way to convict the defendant. Rather, such a reversal means that the prosecution has probably presented sufficient evidence on which to base a conviction, the jury has weighed such evidence correctly, but that its verdict of guilty was obtained through some defect. The only problem is that some type of error prevented the defendant's conviction from being fairly obtained. It is important to recognize, as the Court did in *Burks*, that a trial error reversal does not relate to guilt or innocence.[98]

It can hardly be said, however, that an appellate court reversal which is based on a belief that the jury's verdict is against the weight of the evidence does not, in some way, relate to a determination of guilt or innocence. When the Florida Supreme Court first reversed Tibbs' conviction, it did so because it had serious doubts that Tibbs committed the crime for which the jury had convicted him.[99] These serious doubts usually will not plague a court that reverses for some error in the proceedings. A court that reverses because of trial error is saying that the defendant is probably guilty,[100] but that it would prefer to give him a trial free from error, just to make sure. A court that reverses because it believes that the jury improperly weighed the evidence, a belief which may leave the court with serious doubts about a defendant's guilt, is saying that it thinks that the defendant is probably not guilty, and that it will allow another trial, just to make sure.[101] The Court in *Burks* emphasized that a trial error reversal does

---

[97]The Court in *Burks* stated that a reversal for trial error did not constitute a decision to the effect that the government failed to prove its case. 437 U.S. at 15. Such a statement seems peculiarly limited to reversals for trial error.

[98]*Id. See supra* notes 12-20 and accompanying text.

[99]Tibbs v. State, 337 So. 2d 788, 790 (Fla. 1976).

[100]*See* Comment, *Double Jeopardy*, *supra* note 16, at 370.

> Underlying the idea that the objective of protecting society from those guilty of crime would be substantially frustrated by releasing those defendants whose convictions have been reversed for error is the belief that errors which courts hold to be reversible may have little or no relation to the issue of guilt or innocence.

Id.

[101]*See, e.g.*, Tibbs v. State, 337 So. 2d 788, 791 (Fla. 1976). The Florida Supreme Court ordered a retrial for Tibbs rather than risking the very real possibility that

not go to the guilt or innocence of a defendant.[102] It must be remembered that a reversal based on the weight of the evidence occurs only in exceptional circumstances.[103] Such a reversal, then, obviously does go to a defendant's guilt or innocence.[104] Thus, while *Burks* effectively distinguishes a trial error reversal from an insufficiency reversal, its analysis tacitly places weight reversals on a higher level than trial error reversals.

By permitting a criminal defendant to be retried after his conviction has been reversed because of the weight of the evidence, the Supreme Court has placed weight reversals and trial error reversals in the same category. The Court's failure to recognize the distinction between trial error reversals and weight reversals undermines the foundation of the holding in *Burks*. For if the prosecution, in a proceeding free from error, can introduce no more evidence than that which leaves considerable doubt in the mind of the appellate judges, then the only purpose of retrial is to allow the government an attempt to bolster its weak case.[105] While it is true, as the Court in *Tibbs* mentioned, that such a rule may make it easier for the defendant to obtain an acquittal upon retrial, because the government's case may be more difficult to assemble after the long process of trial-reversal-retrial,[106] this possibility does not seem strong enough to justify the risk that a defendant may be convicted through "repeated prosecutorial sallies."

An additional problem with the Court's failure to distinguish weight reversals from trial error reversals concerns the competing policies to which a court looks in determining whether the double jeopardy clause bars retrial.[107] Before the *Burks* decision, the Court regularly permitted retrial of a defendant after his conviction was

---

Tibbs was innocent. *Id.* Of course, the argument can be made that retrial after trial error reversal also offends double jeopardy. *See* Thompson, *supra* note 16, at 506 n.24. "It could well be argued that retrial should be barred even when the reversal is grounded upon a procedural irregularity. . . . The underlying policy of the double jeopardy clause is to preclude multiple prosecutions for the same offense without regard to the question of guilt." *Id.*

[102]437 U.S. at 15.

[103]*See* 3 C. WRIGHT, *supra* note 18, § 553, at 248.

[104]*See supra* note 97 and accompanying text.

[105]Justice White voiced this concern in his dissent in *Tibbs*. He stated that, "[i]f the state presents no new evidence, the defendant has no new or additional burden to meet in successfully presenting a defense . . . ." 457 U.S. at 48 (White, J., dissenting).

[106]*Id.* at 43-44 n.19. The Court's rationale on this point could lead to the effective dismantling of all double jeopardy protection; a retrial following a defendant's acquittal would be permissible because of the possibility that the prosecution's case will be weaker the second time.

[107]*See supra* notes 38-46 and accompanying text.

reversed because of the following often cited language from *United States v. Tateo*:[108]

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.[109]

While this language may well provide a justifiable basis for permitting retrial following a trial error reversal, it does not support retrial following a reversal based on the weight of the evidence. The only defect in this instance is the government's failure to bring forth enough evidence to convince the appellate court of the defendant's guilt. The Court in *Tibbs* cited the *Tateo* language but nevertheless failed to distinguish the two bases of reversals.

The Court did suggest a similarity between a trial error reversal and a weight reversal. It reasoned that the reversal based on the weight of the evidence "simply affords the defendant a second opportunity to seek a favorable judgment."[110] The problem with this reasoning is that it tends to revive the waiver theory, thought to be discarded by *Burks*.[111] Under the waiver theory, appellate courts ordered a new trial after reversing a defendant's conviction because the defendant waived his double jeopardy claim by seeking a review of his conviction.[112] The Court in *Tibbs* explicitly referred to the second chance it was giving the defendant.[113] The Court neglected to mention that a defendant who gets his conviction reversed because of insufficient evidence is also getting a second chance through retrial. *Burks*, however, decided that this second chance is not always in the defendant's best interests.[114] Thus, the Court in *Tibbs* seems to have reverted to the old fallacy of simply giving the defendant what he requested. Yet, because it is the prosecution's evidence which the appellate court finds lacking when it reverses because of the weight of the evidence, the question must be asked: Who is getting the second chance, the defendant or the prosecution?

---

[108]377 U.S. 463 (1964).

[109]*Id.* at 466, *cited in* Tibbs v. Florida, 457 U.S. 31, 40 (1982); Burks v. United States, 437 U.S. 1, 15 (1978).

[110]457 U.S. at 43. As *Burks* stated, this second opportunity benefits the defendant who succeeds in obtaining a trial error reversal. 437 U.S. at 15.

[111]437 U.S. at 17. *See supra* notes 21-24 and accompanying text.

[112]*See* cases cited *supra* note 11.

[113]457 U.S. at 44.

[114]437 U.S. at 17. *See supra* notes 21-24 and accompanying text.

2. Weight and Sufficiency Revisited.—In *Tibbs*, the Supreme Court decided that appellate reversals based on the weight of the evidence do not cloak the defendant with the same double jeopardy protection that a defendant receives when his conviction is reversed because of insufficient evidence.[115] The Court in part based its conclusion upon the reasoning that, because "the Double Jeopardy Clause attaches special weight to judgments of acquittal,"[116] the clause does not protect a defendant whose conviction is reversed because of the weight of the evidence. The Court concluded that the double jeopardy policies "do not have the same force."[117]

The problem with this reasoning is that it implies that only judgments of acquittal invoke the protection of the double jeopardy clause. However, as Justice White noted in his dissenting opinion, neither the weight nor the sufficiency reversal involves a judgment of acquittal.[118] Yet the double jeopardy clause now protects a defendant whose conviction is reversed because of insufficient evidence.[119] Further, although a sufficiency reversal means that acquittal was the only proper verdict,[120] double jeopardy considerations should not, as Justice White stated, be made to "depend upon a determination that an 'acquittal was the only proper verdict.' The fact remains that the State failed to prove the defendant guilty in accordance with the evidentiary requirements of state law."[121] Surely the double jeopardy clause can attach special weight to a judgment of acquittal and still protect a defendant whose conviction is reversed because of the weight of evidence, that is, because the state failed to generate enough evidence to satisfy an appellate tribunal. A weight reversal may not be tantamount to an acquittal, but its similarity merits similar double jeopardy consideration.[122]

The Court in *Tibbs* also decided that the policy prohibiting the prosecution from supplying "evidence which it failed to muster in the first proceeding"[123] does not have the same force when applied to a weight reversal.[124] The Court's reasoning appears to ignore the pur-

---

[115]457 U.S. at 32.

[116]*Id.* at 41 (citing United States v. DiFrancesco, 449 U.S. 117, 129 (1980); United States v. Scott, 437 U.S. 82, 91 (1978); Arizona v. Washington, 434 U.S. 497, 503 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam)).

[117]457 U.S. at 42.

[118]*Id.* at 49 (White, J., dissenting).

[119]Burks v. United States, 437 U.S. 1 (1978).

[120]*See* Jackson v. Virginia, 443 U.S. 307 (1979).

[121]457 U.S. at 49 (White, J., dissenting).

[122]Again, as the point bears repeating, a reversal based on the weight of the evidence occurs only in circumstances where the evidence preponderates heavily against the verdict. *See* 3 C. WRIGHT, *supra* note 18, § 553, at 248.

[123]457 U.S. at 41 (quoting Burks v. United States, 437 U.S. 1, 11 (1978)).

[124]457 U.S. at 42.

poses of the double jeopardy clause.[125] If, as has been suggested, the double jeopardy clause protects these interests of the defendant by preventing the government, with its superior resources, from wearing down the defendant through sheer governmental perseverance,[126] then it is difficult to see how a reversal based on the weight of the evidence differs from a reversal based on insufficient evidence. All of the often stated hazards are present in both instances. In his dissent in *Tibbs*, Justice White stated that "the only point of any second trial in this case is to allow the State to present additional evidence to bolster its case. If it does not have such evidence, reprosecution can serve no purpose other than harassment."[127] Moreover, society's "countervailing interest in the vindication of criminal justice"[128] seems no greater here than when a conviction is reversed because of insufficient evidence. The Court, however, decided otherwise.

In order to justify making the weight-sufficiency distinction a constitutional line of demarcation, the Court in *Tibbs* emphasized that a reversal based on the weight of the evidence means that "the appellate court sits as a 'thirteenth juror' and disagrees with the jury's resolution of conflicting testimony."[129] The Court decided that this disagreement does not have the same force as an appellate court determination that the evidence should not even have been submitted to the jury.[130]

It is true that under modern appellate procedure in federal courts the appellate court sits as a "thirteenth juror" when passing on a defendant's motion for a new trial.[131] As such, the appellate court may reweigh the evidence and take into account the credibility of the witnesses, something it may not do when it is testing the sufficiency of the evidence.[132] If the appellate court decides that a miscarriage of justice may have occurred or if it has serious doubts about a particular defendant's guilt, the appellate court may set the conviction aside and order a new trial.[133]

The sufficiency of the evidence standard is different insofar as appellate courts may not reweigh the evidence or assess the credibility

---

[125]*See supra* notes 38-42 and accompanying text.

[126]*See* Tibbs v. Florida, 457 U.S. 31, 41 (1982); Burks v. United States, 437 U.S. 1, 11 (1978); Green v. United States, 355 U.S. 184, 187-88 (1957).

[127]457 U.S. at 48 (White, J., dissenting).

[128]Green v. United States, 355 U.S. 184, 219 (1957) (Frankfurter, J., dissenting). *See supra* note 44 and accompanying text.

[129]457 U.S. at 42.

[130]*Id.*

[131]*See, e.g.*, United States v. Turner, 490 F. Supp. 583, 593 (E.D. Mich. 1979), *aff'd*, 663 F.2d 219 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

[132]*See* 3 C. WRIGHT, *supra* note 18, § 553, at 245-46.

[133]*Id.* at 246.

of witnesses,[134] but must take all of the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt.[135]

Apart from any double jeopardy considerations, this distinction between the weight and the sufficiency of the evidence presents few problems. The government must present legally sufficient evidence in order to avoid a judgment of acquittal.[136] If it does, the sufficiency test is satisfied. But the government must go further. It must present the evidence in such a manner as to permit the jury to fairly conclude guilt upon a weighing of all the evidence or risk an appellate court reversal.[137]

Though the distinction between the weight and the sufficiency of the evidence may be easy to understand in an abstract setting, its application to specific fact situations is often much more difficult. The majority in *Tibbs* proceeded on the assumption that the distinction is easily applied,[138] but, ironically, Tibbs' procedural path to the Supreme Court does not support such a conclusion. In fact, the Florida Supreme Court's struggle with *Tibbs v. State (I and II)*[139] is a strong indication that making the weight-sufficiency distinction a constitutional line of demarcation creates conceptual confusion.

In *Tibbs I*,[140] the Florida Supreme Court reversed Tibbs' conviction "in the interests of justice."[141] The court did not state whether it thought that the evidence was legally insufficient to sustain the conviction, or whether the conviction was against the weight of the evidence. Language in the opinion lends support to the idea that the court had both in mind.[142] The court did reweigh the evidence and examine the credibility of the witnesses. However, the court cited language to the effect that a conviction cannot be sustained where the evidence "is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt."[143] This is, of

---

[134]*See* United States v. Thevis, 665 F.2d 616, 648 (5th Cir. 1982); United States v. Lincoln, 630 F.2d 1313, 1316 (8th Cir. 1980); United States v. Artuso, 618 F.2d 192, 195 (2d Cir.), *cert. denied*, 449 U.S. 861 (1980); United States v. Beck, 615 F.2d 441, 448 (7th Cir. 1980); United States v. Turner, 490 F. Supp. 583, 588 (E.D. Mich. 1979), *aff'd*, 633 F.2d 219 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *see also* 2 C. WRIGHT, *supra* note 18, § 467, at 663-64.

[135]Jackson v. Virginia, 443 U.S. 307, 319 (1979). *See* cases cited *supra* note 134.

[136]*See* FED. R. CRIM. P. 29(a).

[137]*See* FED. R. CRIM. P. 33.

[138]457 U.S. at 44-45.

[139]Tibbs v. State, 337 So. 2d 788 (Fla. 1976) (*Tibbs I*); Tibbs v. State, 397 So. 2d 1120 (Fla. 1981) (*Tibbs II*).

[140]337 So. 2d 788 (Fla. 1976).

[141]*Id.* at 790.

[142]*See id.* at 790-91.

[143]337 So. 2d at 791 (quoting McNeil v. State, 104 Fla. 360, 361, 139 So. 791, 792 (1932)).

course, the federal evidentiary standard for testing the sufficiency of the evidence.[144] The United States Supreme Court touched on this problem briefly in a footnote to its opinion in *Tibbs v. Florida*, but found the quotation, when put in context, to be consistent with a weighing of the evidence.[145]

Noting the ambiguities in *Tibbs I*, the Flordia Supreme Court, in *Tibbs II*, attempted to clarify its earlier reversal: "Only by stretching the point, however, could we possibly use an 'insufficiency' analysis to characterize our previous reversal of Tibbs' convictions."[146] Chief Justice Sundberg dissented vigorously. He contended that the first reversal of Tibbs' conviction could not have been based on the weight of the evidence since Florida law permitted only sufficiency reversals.[147] The Florida Supreme Court, in order to rid itself of the difficult determination of whether a reversal was based on evidentiary weight or evidentiary sufficiency, decided that it would never again permit its appellate courts to reweigh evidence.[148]

The Florida Supreme Court's struggle was the result of the difficulty of drawing a line between evidentiary weight and evidentiary sufficiency. The problem lies in the fact that the *Jackson v. Virginia* standard for testing the sufficiency of the evidence—whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt—[149]inevitably leads an appellate court to make some subjective determination as to the weight of the evidence.[150] The pro-

---

[144]2 C. WRIGHT, *supra* note 18, § 467, at 655-56.

[145]457 U.S. at 46 n.23. The Court stated that the quotation from *McNeil v. State*, when read in context, did not support the conclusion that the Florida Supreme Court used the *McNeil* standard when it reversed Tibbs' conviction. Even if the language from the *McNeil* decision was not the sole basis of the Florida Supreme Court's decision, it was in the justices' minds, which demonstrates that the weight and sufficiency standards are not always susceptible to strict categorization.

[146]Tibbs v. State, 397 So. 2d 1120, 1126 (Fla. 1981).

[147]*Id.* at 1127 (Sundberg, C.J., dissenting in part).

[148]*Id.* at 1125. The fact that the basis for the previous reversal was even a point of contention shows the possible problems involved in attempting to make double jeopardy protection rest on a classification of weight or sufficiency.

[149]443 U.S. at 319.

[150]For a critical analysis of the subjectivity inherent in the *Jackson v. Virginia* test, see Comment, *The* Jackson v. Virginia *Standard for Sufficiency of the Evidence*, 65 IOWA L. REV. 799 (1980). The author of this Comment states that

> the "rational fact finder" standard [of *Jackson v. Virginia*] requires the appellate court to ask whether a hypothetical trier of fact, rather than the appellate court itself, acting reasonably, would have found the defendant guilty beyond a reasonable doubt. However, when an appeals court determines whether the fact finder has acted reasonably, it must inevitably make some determination as to the weight of the evidence, even while giving the trial court very broad discretion. This necessarily results in some substitution of the appellate court's judgment for that of the trial court.

Id. at 807 (footnotes omitted).

cedural posture in *Tibbs* provides a good illustration of the inherent subjectivity of the sufficiency of the evidence standard. At the trial court level, the jury could have chosen to believe the uncorroborated testimony of the prosecutrix. The majority of the Florida Supreme Court decided that this alone was sufficient to satisfy the sufficiency of the evidence standard.[151] Justice Boyd, however, wrote a persuasive dissenting opinion in which he observed that "when an appellate court judges the sufficiency of evidence to support a criminal conviction, it does so upon the whole record, and will therefore not always be bound by such general rules of sufficiency as the one pertaining to the uncorroborated testimony of a rape victim."[152] Thus, some appellate judges believe that a determination of the sufficiency of the evidence must involve consideration of the whole record, while others believe that once the evidence is technically sufficient with regard to any aspect of the case, the inquiry into evidentiary sufficiency ceases. The weakness of the state's evidence presented in *Tibbs*[153] forced the Florida Supreme Court to make subjective determinations to such an extent that its members could not decide which evidentiary standard formed the basis of its reversal.

The greatest problem flowing from this subjectivity is the possibility that in close cases, that is, cases in which reasonable persons could disagree as to whether the evidence is legally sufficient, a court faced with the possibility of reversing because of the sufficiency of the evidence, and thereby effectively acquitting the defendant under *Burks*, or reversing because of the weight of the evidence, and thereby subjecting the defendant to retrial under *Tibbs*, will invariably chose the latter so as to avoid the decision of acquitting the defendant.[154] At least one court has already expressed reluctance about

---

See also Speigner v. Jago, 603 F.2d 1208 (6th Cir. 1979). The Court of Appeals for the Sixth Circuit showed its awareness of the often ambiguous distinction between the weight and the sufficiency of the evidence by stating: "[W]e are convinced that it is time to forthrightly recognize that the 'no evidence' standard of *Thompson,* as it prevails today, incorporates some notion of degree or weight of evidence." *Id.* at 1212 (footnote omitted) (referring to Thompson v. City of Louisville, 362 U.S. 199 (1960)).

It is noteworthy that the *Thompson* standard, to which the *Speigner* court alluded, was an even more restrictive sufficiency of the evidence standard than the one created in *Jackson v. Virginia.* The point is that the weight-sufficiency distinction is not always readily discernible and is certainly not always easily applied.

[151]Tibbs v. State, 397 So. 2d 1120, 1126 (Fla. 1981) (citing Thomas v. State, 167 So. 2d 309 (Fla. 1964)).

[152]397 So. 2d at 1130 (Boyd, J., dissenting).

[153]*See supra* note 62 and accompanying text.

[154]Of course, the converse of this is also a possibility. An appellate court which subjectively believes that a defendant is innocent may call the evidence insufficient so as to preclude a second trial, even though the evidence is technically sufficient. *Cf.* Tibbs v. Florida, 397 So. 2d 1120, 1130-31 (Fla. 1981) (Boyd, J., dissenting).

its power to acquit defendants by finding insufficient evidence on some element of the government's case.[155]

Justice White, dissenting in *Tibbs*, expressed the same concern that appellate "judges having doubts about the sufficiency of the evidence under the *Jackson* standard may prefer to reverse on the weight of the evidence, since retrial would not be barred."[156] The majority in *Tibbs* quickly dismissed this possibility. The Court placed confidence in trial and appellate judges' ability to distinguish between the weight and the sufficiency of the evidence.[157] Also, the Court stated, appellate courts could not disguise sufficiency reversals as weight reversals because of the constitutional standard of evidentiary sufficiency as announced by the Court in *Jackson v. Virginia*.[158]

The Court's reasoning on this point begs the question. The Court does not take into account the increased difficulty appellate judges will have in determining whether the evidence is sufficient where the decision will either effectively acquit the defendant or permit his retrial. Additionally, while the *Jackson v. Virginia* standard ensures somewhat against an arbitrary classification of evidentiary sufficiency, it also involves some subjective determination by the appellate court which includes a weighing of the evidence.[159]

3. Double Jeopardy After Tibbs.—In his dissent in *Tibbs II*, Chief Justice Sundberg of the Florida Supreme Court stated:

> I feel the majority in its efforts at drawing fine lines has lost sight of the central import of the double jeopardy clause. The question posed is simply whether Tibbs will suffer double jeopardy if retrial is allowed—yes or no, why or why not. The answer is ineluctably affirmative.[160]

The harms against which double jeopardy was designed to protect[161]

---

[155]*See* Stacey v. Love, 679 F.2d 1209 (6th Cir. 1982). The court in *Stacey v. Love*, in reversing the conviction of a defendant who raised the insanity defense on which the prosecution presented no evidence, remarked that it was "deeply troubled by the implications of the case. . . . [and] acutely aware that overturning [the defendant's] conviction for insufficient evidence operates as an acquittal and thereby calls into effect the constitutional proscription against double jeopardy." *Id.* at 1212. Had any evidence been presented on the insanity defense, the court may have been more than willing to call its reversal one based on weight.

[156]457 U.S. at 51 (White, J., dissenting).

[157]*Id.* at 44-45.

[158]*But see supra* note 150 and accompanying text.

[159]*See* Comment, *supra* note 150, at 807. During oral argument before the Supreme Court in *Burks v. United States*, counsel for the government argued that "[t]he line [between weight and sufficiency of the evidence] is difficult to draw in some cases" and "[s]ometimes it cannot be determined where the basis for a reversal lies." Burks v. United States, 22 CRIM. L. REP. (BNA) 4117, 4118 (U.S. Nov. 28, 1977).

[160]Tibbs v. State, 397 So. 2d 1120, 1127 (Fla. 1981) (Sundberg, C.J., dissenting in part).

[161]*See supra* notes 38-46 and accompanying text.

are all present in both the evidentiary weight reversal and the evidentiary sufficiency reversal. At retrial in *Tibbs*, as Justice White noted, the state must present additional evidence to bolster its case; if it merely presented the same evidence at a second trial, then an appellate court would be compelled to reverse again.[162] This makes it appear that the only purpose of allowing retrial after a reversal based on the weight of the evidence is to give the government an opportunity to bolster its case against the defendant by supplying evidence which it "failed to muster" in the first proceeding.[163] Such an opportunity is the type of harm which double jeopardy is designed to prevent.[164]

IV. Conclusion

After *Tibbs*, appellate reversals which are based on the Court's belief that the verdict is against the weight of the evidence do not prohibit the state from conducting a second trial against the defendant. Such a reversal means that, even though the appellate court may be left in considerable doubt about the defendant's guilt, the defendant may be retried without violating the double jeopardy clause. Insofar as this decision places weight reversals on the same level as trial error reversals, it appears to be incongruous with the broad double jeopardy language in *Burks*, and also produces the erroneous notion that a weight reversal does not touch upon a defendant's guilt or innocence.

Further, the weight-sufficiency distinction, often difficult to apply, may encourage appellate courts which find the evidence arguably insufficient, to call it sufficient and choose to reverse the judgment based on a determination that the verdict is against the weight of the evidence, and thereby avoid deciding that the defendant should be acquitted. In order to eliminate the problem caused by the distinction between weight and sufficiency reversals, the double jeopardy clause should be read to prohibit retrial whenever an appellate court determines that the state has presented a substantive lack of evidence[165] in prosecuting its case. This would not create an inordinate number of acquittals because a reversal based on the weight of the

---

[162]457 U.S. at 48 (White, J., dissenting). The majority addresses this point by stating that the weight of the evidence standard may be more restrictive after a second conviction, and thus an appellate tribunal may be more reluctant to reverse the second time around. *Id.* at 43 n.18. The Court's reasoning, while giving some assurance against triple jeopardy, still seems to lose sight of the purpose of the double jeopardy clause.

[163]*Id.* at 48 (White, J., dissenting). As Justice White noted, such a retrial serves only to harass the defendant if additional evidence is not permitted. *Id.*

[164]Burks v. United States, 437 U.S. 1, 11 (1978).

[165]*See* 457 U.S. at 39 n.13 (citing Tibbs v. Florida, 397 So. 2d 1120, 1128 (Fla. 1981) (Sundberg, C.J., dissenting in part)).

evidence occurs only in exceptional circumstances, when the evidence preponderates heavily against the verdict.[166]

In placing appellate reversals based on the weight of the evidence on the same level as trial errors reversals, the Supreme Court has lost sight of the central import of the double jeopardy clause by subordinating the strong policies supporting double jeopardy application to a technical evidentiary standard.

JAMES L. TURNER

---

[166]*See* 3 C. WRIGHT, *supra* note 18, § 553, at 247-48.

The *Feres* Doctrine: Should It Apply to Atomic Veterans' Children?

I. Introduction

Although the United States witnessed the advent of atomic warfare in World War II, there was little opportunity during the war to study the effects of nuclear warfare on troop performance. During the 1950's, therefore, the Department of Defense conducted a series of "atomic war games" to determine how troops would perform in the event of a nuclear war.[1] The servicemen who participated in the war games, now known as atomic veterans, were exposed to high levels of harmful radiation without the benefit of protective gear or monitoring devices.[2] The government never warned the servicemen of the possible harmful effects the radiation exposure could have on the health of their children. Instead, the government stressed that "[m]en exposed to radiation can have normal, healthy children."[3] The converse of this statement became painfully apparent to many servicemen when their children were born with severe radiation-induced birth defects.

In recent years, the atomic veterans' children have sought

---

[1]*See* Favish, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation,* 32 Hastings L.J. 933, 934 (1981). The war games were not the only source of radiation exposure. Other servicemen were exposed to radiation in connection with the government's development of atomic weapons. *See infra* note 71.

[2]Favish, *supra* note 1, at 949-52.

[3]*Id.* at 954 (quoting Infantry School Quarterly, Oct., 1955, at 11). The extremeness of the government's actions has been recognized by at least one lower federal court.

> "These allegations charge a violation of human rights on a massive scale. The plaintiffs seek to prove, and we must at this state assume that they can, that civilian and military officials of the government, acting without legal authority and with no sufficient legitimate military or other purpose, conducted a human experiment upon soldiers subject to their control, without their knowledge, permission or consent, by exposing them to radiation which those officials knew to be dangerous [sic]
>
> . . . . .
>
> Indeed the complaint alleges conduct which would violate the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Geneva Convention, the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Nuremburg Code. The international concensus against involuntary human experimentation is clear. *A fortiori* the conduct charged, if it occurred, was in violation of the Constitution and laws of the United States and of the state where it occurred or where its effects were felt."

Hinkie v. United States, 715 F.2d 96, 98 n.3 (3d Cir. 1983) (quoting Jaffee v. United States, 663 F.2d 1226, 1248-50 (3d Cir. 1981) (Gibbons, J., dissenting)).

recovery from the government for their injuries by bringing actions under the Federal Tort Claims Act (FTCA).[4] The major issue in this type of litigation is whether these children have any right to actions under the FTCA for the injuries they suffered due to their fathers' radiation exposure.[5] The FTCA, passed by Congress in 1946, waived the government's immunity from tort actions brought against it by private citizens.[6] Accompanying the waiver of immunity were a number of exceptions,[7] two of which applied directly to servicemen.[8] In the 1950 case of *Feres v. United States*,[9] the United States Supreme Court interpreted these two FTCA exceptions as barring actions brought by servicemen for injuries that were incident to their service in the armed forces.[10] Twenty-seven years later in *Stencel Aero Engineering Corp. v. United States*,[11] the Court extended this rule, known as the *Feres* doctrine, to preclude recovery by third parties whose injuries were derivative of a serviceman's nonactionable injuries.[12]

Since the *Stencel* decision, a number of lower federal courts have struggled with the proper application of the *Feres* doctrine to children of servicemen exposed to radiation while on active military duty.[13] A classic example of this struggle is found in *Hinkie v. United States*.[14] In *Hinkie*, the United States District Court for the Eastern District of Pennsylvania concluded that a proper application of the factors outlined in the *Stencel* decision would permit the servicemen's children to bring actions under the FTCA for their radiation induced injuries.[15]

---

[4]28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1976) [hereinafter referred to as FTCA].

[5]*See* Hinkie v. United States, 715 F.2d 96 (3d Cir. 1983); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

[6]28 U.S.C. § 1346(b) (1976).

[7]*Id.* § 2680.

[8]*Id.* § 2680(j), (k). The statutory language excludes: "(j) Any claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. (k) Any claim arising in a foreign country."

[9]340 U.S. 135 (1950).

[10]*Id.* at 146.

[11]431 U.S. 666 (1977).

[12]*Id.* at 674. For general information on the doctrine, see Jacoby, *The* Feres *Doctrine*, 24 HASTINGS L.J. 1281 (1973); Note, *The Effect of the* Feres *Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241 (1982); Note, *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979).

[13]*See, e.g.*, Hinkie v. United States, 715 F.2d 96 (3d Cir. 1983); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

[14]524 F. Supp. 277 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983).

[15]524 F. Supp. at 285.

However, the Third Circuit Court of Appeals reluctantly reversed the district court opinion on the basis that the *Feres* doctrine's protection of military discipline barred such actions.[16] Other courts addressing this issue have reached the same result as the Third Circuit Court of Appeals in *Hinkie*.[17]

While there appears to be no conflict among the circuit courts as to the application of the *Feres* doctrine to servicemen's children, the Supreme Court has never specifically addressed the issue. Until either the Supreme Court or Congress takes some type of action to deal with the problems of atomic veterans' children, the issue will remain an important and vital one.

This Note examines the propriety of extending the *Feres* doctrine to preclude atomic veterans' children from recovering for birth defects caused by their fathers' exposure to radiation during military service and suggests that the majority of lower federal courts that have dealt with this issue have not taken the proper approach. The application of the *Feres* doctrine to third parties is a judicial expansion of the FTCA exceptions. Therefore, courts should carefully review the policies and rationales underlying the *Feres* doctrine before expanding the doctrine to prohibit actions by the atomic veterans' children. When such an examination occurs, as in the district court opinion in *Hinkie*, it leads to the conclusion that the doctrine should not be extended to preclude FTCA actions by the atomic veterans' children. This Note examines the various theories that the children could assert and concludes that even if courts allow the children a right of action under the FTCA, the burden of proof the children must meet is likely to create a substantial bar to recovery. Therefore, this Note suggests that Congress should consider creating a compensation fund that is available to atomic veterans' children upon a minimal showing of causation, unless the government can prove that its actions did not cause the birth defects. In lieu of this specific legislation, Congress should consider redrafting the FTCA military exceptions so that servicemen's families have the right to bring actions against the government for

---

[16]715 F.2d 96, 98-99 (3d Cir. 1983). This focus on the effects such actions would have on military discipline is understandable in light of Chappell v. Wallace, 103 S. Ct. 2362 (1983). In *Chappell*, the Court determined that the *Feres* doctrine was a valid doctrine in light of "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel." *Id.* at 2367. However, *Chappell* dealt with a situation in which five enlisted men were seeking damages, declaratory judgment, and injunctive relief against several officers on a combat naval vessel. Thus, the Court's concern with discipline in that particular circumstance is understandable. The Court also noted that the servicemen involved had administrative remedies available to them under the Uniform Code of Military Justice. *Id.* at 2366.

[17]*See, e.g.*, Mondelli v. United States, 711 F.2d 567 (3d Cir. 1983); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

physical injuries they sustain due to the government's negligence, even when those injuries are derivative of the servicemen's injuries.

II. BACKGROUND: FROM *BROOKS* TO *STENCEL*

The doctrine of sovereign immunity developed from the ancient notion that "the King can do no wrong" and that it was contrary to notions of sovereignty to allow a King to be sued in his own courts.[18] The doctrine became embodied in American law under the rationale that "there [could] be no legal right as against the authority that makes the law on which the right depends."[19] In 1946, Congress passed the Federal Tort Claims Act[20] to mitigate the hardships created by sovereign immunity and to provide citizens injured by government activities a forum in which they could seek recovery for their injuries.[21] The FTCA requires that actions against the government be brought in the federal courts but provides that liability be determined under the local law of the place where the act giving rise to the injury occurred.[22]

In waiving immunity, Congress carved out certain exceptions where an injured party would not have a right of action against the government.[23] Two of these exceptions have been deemed to apply directly to servicemen and involve claims that arise from combat duty or in a foreign country.[24] The legislative intent behind these two exceptions is, at best, ambiguous because there is no legislative history available for review.[25] As a result, the courts have little to guide them in interpreting and applying the servicemen's exceptions.

Three years after the passage of the FTCA, the Supreme Court

---

[18]W. PROSSER, HANDBOOK OF THE LAW OF TORTS 970 (4th ed. 1971); *see also* Note, *The Federal Tort Claims Act: A Cause of Action for Servicemen*, 14 VAL. U.L. REV. 527 (1980).

[19]Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

[20]*See supra* note 4.

[21]H.R. REP. No. 1287, 78th Cong., 1st Sess. 2 (1946). The hardships created by sovereign immunity were in the nature of remediless injuries due to the lack of a forum in which to seek recovery. *See* Note, *supra* note 18, at 531.

[22]28 U.S.C. § 1346(b) (1976).

[23]*Id.* § 2680.

[24]*Id.* § 2680(j), (k). *See supra* note 8.

[25]Feres v. United States, 340 U.S. 135, 138 (1950). The Court in *Feres* did, however, interpret the legislature's intent as denying servicemen the right to action. The Court reasoned that because the FTCA required that state law be applied, the situs of the servicemen's injury would dictate their right to recovery. Because the law of the states varied, recovery would be non-uniform which indicated an irrational plan of recovery. In addition, the Court noted that the federal character of the relationship between servicemen and the government required that federal law govern rather than whatever state law might be applicable. Because no federal law recognized recovery by servicemen, their actions could not be pursued in state courts that might allow recovery. *Id.* at 143-44.

decided the case of *Brooks v. United States*.[26] In *Brooks*, two servicemen were on furlough when a negligently operated Army truck struck their private car. One serviceman was killed and the other sustained serious injuries. The Court allowed recovery, holding that the FTCA exceptions relating to servicemen did not apply in this case because the servicemen's injuries were not incidental to their service in the armed forces.[27] The Court did not address the application of the exceptions to servicemen who were not on leave, but merely stated that "[w]ere the accident incident to . . . Brooks' service, a wholly different case would be presented."[28] One year later the Court had the opportunity to address this very situation in *Feres v. United States*.[29]

In *Feres*, the Court examined the issue of whether servicemen on active duty and not on furlough could bring suit under the FTCA for injuries sustained due to the negligence of other members of the armed forces.[30] The Court first found that the servicemen's injuries were incident to their service.[31] It is interesting to note that, although the Court stated the injuries were incident to service, it never explained why. The Court only commented that the servicemen were on active duty. The Court's assumption seemed to be that being on active duty and not on leave constituted "incident to service."[32]

After determining that the injuries sustained were incident to service, the Court interpreted the two FTCA exceptions applicable

---

[26]337 U.S. 49 (1949).

[27]*Id.* at 54. The Court of Appeals for the Fourth Circuit had indicated that the servicemen were "on leave or furlough, engaged in their private concerns and not on any business connected with their military service." 169 F.2d 840, 841 (1948). Therefore, the Court deemed the injuries not to be incident to service. 337 U.S. at 54. In its analysis, the Court noted that many previous tort claims bills had been introduced into Congress between 1925 and 1935 and all but two had contained exceptions denying recovery to servicemen. The Court reasoned that because the FTCA omitted these general exceptions and included specific exceptions, Congress could not have intended that all claims by servicemen be excluded. *Id.* at 51.

[28]337 U.S. at 52.

[29]340 U.S. 135 (1950). *Feres* was a consolidation of three cases, *Feres v. United States*, *Jefferson v. United States*, and *United States v. Griggs*. The *Feres* case involved an action brought against the government for the negligent death of a serviceman who died in a barracks fire. *Jefferson* involved a negligence action against the government brought by a discharged serviceman who had had abdominal surgery while in the service. Eight months after the initial surgery and after his discharge, the plaintiff was operated on again. During the second surgery a 30-by-18 inch towel, marked "Medical Department U.S. Army," was discovered and removed from the plaintiff's stomach. The *Griggs* case was also a negligence action and alleged the serviceman had died while on active duty because of "negligent and unskillful medical treatment by army surgeons." *Id.* at 136-37.

[30]*Id.* at 138.

[31]*Id.*

[32]*Id.*

to servicemen to mean that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service."[33] In reaching this conclusion, the Court, relying on *United States v. Standard Oil*,[34] determined that a federal relationship existed between the servicemen and the government and that federal law should govern this relationship.[35] In *Standard Oil*, the Court had determined that a federal relationship existed when federal policy, affecting the government's legal interests and relations, was involved.[36] Specifically, the Court noted that the government-soldier relationship was "distinctively and exclusively a creation of federal law" and there was "no good reason" why the government's rights and liability should depend on various state rulings.[37] Because of the federal character of the relationship and the anomalous results that would occur if state law were applied, the Court concluded that federal law, not state law, should apply where the government-soldier relationship existed.[38]

Applying this rationale in *Feres*, the Court determined that no action for servicemen existed under the FTCA because no federal law recognized the type of recovery the servicemen sought, and because the FTCA was intended only to waive immunity from recognized causes of action and not to create any new liabilities for the government.[39] The Court also suggested that the existence of the Veterans' Benefit Act[40] indicated that Congress intended to deny recovery under the FTCA for injuries incident to military service.[41] This denial of servicemen's rights to bring tort actions under the FTCA against the government for service-related injuries is now known as the *Feres* doctrine.

Four years after *Feres*, the Supreme Court qualified the application of the *Feres* doctrine in *United States v. Brown*.[42] In *Brown*, a

---

[33]*Id.* at 146.

[34]332 U.S. 301 (1947). In *Standard Oil*, the government was seeking indemnification from a third-party tort-feasor for injuries to a serviceman.

[35]340 U.S. at 143-44. *See supra* note 25.

[36]332 U.S. at 309.

[37]*Id.* at 310.

[38]*Id.* at 310-11.

[39]340 U.S. at 142-44. In applying the *Standard Oil* rationale, the Court in *Feres* did not make any policy distinctions between denying the federal government indemnification from a third party for injuries to a serviceman, *see supra* note 36, and denying a serviceman recovery from the federal government. A consideration of the distinctions may have led to a different result in *Feres*.

[40]The pertinent provisions of the Veterans' Benefit Act for this Note may be found at: 38 U.S.C. §§ 361-362 (1976) (compensation for service); *id.* §§ 601-654 (connected death, hospital, domiciliary, and medical care); *id.* §§ 701-788 (life insurance); 10 U.S.C. §§ 1071-1087 (1976) (insurance for retired military personnel).

[41]340 U.S. at 144.

[42]348 U.S. 110 (1954).

serviceman had been discharged from the service because of a knee injury incurred while he was on active duty. Six years after his discharge, Brown went to a Veterans Administration hospital to have surgery on his knee. During the operation a defective tourniquet was used, and Brown suffered permanent injury to the nerves in his leg. Brown received increased compensation under the Veterans' Benefit Act, but he also brought an action against the government under the FTCA. The district court dismissed his case on the basis that the Veterans' Benefit Act was his exclusive remedy.[43] The court of appeals reversed, and the Supreme Court granted certiorari because it was unclear whether *Brooks v. United States*[44] or *Feres v. United States*[45] should apply.[46]

The Court in *Brown* held that *Brooks*, not *Feres*, was controlling because Brown was not on active duty nor subject to military discipline when the negligent act giving rise to the injury occurred.[47] The Court determined that allowing the cause of action would not affect military discipline, because the special relationship between the soldier and his superiors no longer existed.[48] The majority rejected the "but for" rationale urged by the dissent[49] and permitted Brown to bring his action against the government under the FTCA.[50] In allowing the suit, the Court looked at the time the government's negligence occurred, not the time of the original injury which was incident to service and thus would have barred recovery.

In 1977, the Supreme Court expanded the *Feres* doctrine, in *Stencel Aero Engineering Corp. v. United States*,[51] to preclude recovery by third parties when the claim arose because of a serviceman's injury. In *Stencel*, the Supreme Court denied recovery to a third-party manufacturer seeking indemnity from the United States for damages it may have had to pay to a serviceman for a service-related injury. The serviceman was injured when the egress life support system of his fighter aircraft, which had been manufactured by the third party, malfunctioned.[52] In denying recovery, the Supreme Court stressed

---

[43]*Id.* at 110-11.

[44]337 U.S. 49 (1949).

[45]340 U.S. 135 (1950).

[46]348 U.S. at 110-11.

[47]*Id.* at 112.

[48]*Id.*

[49]*Id.* at 114 (Black, J., dissenting). Justice Black argued that "but for" the veteran's military service, the injury would not have occurred; therefore *Feres* should bar recovery. *Id.*

[50]*Id.* at 113.

[51]431 U.S. 666 (1977).

[52]The serviceman sued Stencel as the manufacturer of the ejection system and Stencel cross-claimed against the United States. Stencel charged that any malfunction was due to faulty "specifications, requirements, and components provided by the United States or other persons under contract with the United States." *Id.* at 668.

three factors. First, the Court looked to the distinctively federal character of the relationship between the United States and its servicemen.[53] Although federal law governs this relationship, liability under the FTCA is determined by state law.[54] Therefore, the Court determined that the government's liability for servicemen's injuries would depend on where the servicemen were stationed when their injuries occurred, and government liability should not depend on such a fortuitous factor.[55] The second factor concerned the Veterans' Benefit Act's establishment of "a statutory 'no fault' compensation scheme which provided generous pensions to injured servicemen,"[56] and created "an upper limit of liability for the Government as to service-connected injuries."[57] Finally, the Court cited

> "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty."[58]

After identifying these three factors as the underlying rationales of the *Feres* doctrine, the Court applied the factors to Stencel's third-party claim.

The Court in *Stencel* established that the relationship between the government and Stencel, as a supplier of ordnance, was "distinctively federal in character."[59] Therefore, the same rationale applied to Stencel as to the servicemen, and federal law, not the state law of the situs of the injury, should apply when determining whether an action could be brought under the FTCA.[60] The Court went on to reason that where

---

[53]*Id.* at 671. The federal character of the government-soldier relationship and the existence of the Veterans' Benefit Act were both factors the Supreme Court relied on when it denied recovery in *Feres*. 340 U.S. at 143-44.

[54]*See supra* text accompanying note 22.

[55]431 U.S. at 671-72. *See supra* text accompanying notes 35-39.

[56]431 U.S. at 671.

[57]*Id.* at 673. The court in *Stencel* relied on *Feres* in determining that the Veterans' Benefit Act was a factor to be considered in granting or denying servicemen the right to action under the FTCA. *Id.* at 671.

The Veterans' Benefit Act provides no compensation to the servicemen's children for their birth defects. 38 U.S.C. §§ 314-315, 331-337, 611-613 (1976). While some of these sections do allow dependents to receive certain types of medical benefits, or allow the veteran to receive increased benefits, none of them grant the dependents any compensation based on their own injuries. All recovery is based on the severity of the serviceman's injury. *See* at §§ 314-315. Also, before the veteran collects additional benefits for his dependents, he must have a disability rating of "not less than 50 per centum." *Id.* § 335.

[58]431 U.S. at 671-72 (quoting United States v. Brown, 348 U.S. 110, 112 (1954)).

[59]431 U.S. at 672.

[60]*Id. See supra* text accompanying notes 38-39, 55.

a suit concerned an injury sustained by a soldier while on active duty, the effect the action would have on military discipline would be the same regardless of whether the suit was brought by the soldier or by a third party.[61] The Court stated that, in either case, the trial would involve the second-guessing of military orders and "would often require members of the Armed Services to testify in court as to each other's decisions and actions."[62]

The fact that the third party could not recover under the Veterans' Benefit Act was considered, but not accepted, as a controlling factor.[63] Instead, the Court stated that the Veterans' Benefit Act was designed to provide an upper limit to the government's liability for service-related injuries, and allowing the third-party claim would circumvent this "essential [feature] of the Veterans' Benefit Act."[64] It was determined that Stencel had no basis to claim this result was unfair because its relation with the United States was based on a commercial contract.[65] In addition, Stencel had sufficient notice of the risk that such third-party actions might be barred by *Feres*, and Stencel could have considered this risk when it negotiated its contract with the government.[66] The Court concluded that because all three factors applied to Stencel, its third-party action was barred by the *Feres* doctrine.[67] The Court's broad interpretation that the FTCA exceptions exclude servicemen's claims which are incident to service has led to a general denial of recovery to third parties when their action is based on a serviceman's nonactionable claim. However, the third-party claim in *Stencel* was not summarily dismissed without consideration of the relationship between the government and Stencel or an application of the factors underlying the *Feres* doctrine. Unfortunately, this same consideration has not been given to the claims of atomic veterans' children.

III. The Children's Right to Tort Actions Under the FTCA

A. The Lower Courts' Reasoning for Denial of Recovery

The United States Supreme Court has not yet determined whether the *Feres* doctrine, as extended by *Stencel*, not only precludes the servicemen's claims for "incident to service" injuries, but also any derivative claims brought by the servicemen's children. Several federal circuit courts, however, have addressed this issue and have determined that servicemen's children are barred from bringing suit under the

---

[61] 431 U.S. at 673.
[62] *Id.*
[63] *Id.* at 673.
[64] *Id.*
[65] *Id.* at 674.
[66] *Id.* at 674 n.8.
[67] *Id.* at 674.

FTCA.[68] The analysis that the majority of the federal courts have used is to first hold that the veterans are not entitled to recover under the FTCA because their injuries are incident to service. Then, the courts note that the children's injuries are derivative of the veterans' injuries and therefore the children have no right to bring an action under the FTCA.[69] In reaching this conclusion, the courts never directly apply the rationales underlying the *Feres* doctrine to the children, but rather bar the children's actions on the basis of the rationales' application to the servicemen.

Lombard v. United States[70] is one of the most recent decisions affirming the view that the *Feres* doctrine bars children from bringing tort actions for birth defects allegedly caused by their fathers' exposure to radiation while in active military service.[71] In *Lombard*, the serviceman had been exposed to radioactive materials between 1944 and 1946. After leaving the service, he had four children. All four children suffered "moderate to severe congenital defects as a direct consequence" of the father's chromosomal injuries from the radiation exposure.[72] Before deciding the main issues presented, the *Lombard* court examined the *Feres* decision and its progeny. The court noted that although the FTCA was a waiver of government immunity, the Supreme Court had determined that the FTCA did not waive sovereign immunity when servicemen brought actions for service-related injuries.[73] The court then noted three factors which underlie the *Feres* doctrine.[74] These three factors were outlined in *Stencel Aero Engineering Corp. v. United States*[75] and generally are referred to as the *Stencel* factors.

The three *Stencel* factors, as noted earlier, are the distinctly

---

[68]*See, e.g.*, Hinkie v. United States, 715 F.2d 96 (3d Cir. 1983); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

[69]*See* Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); *In re* "Agent Orange" Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980).

[70]690 F.2d 215 (D.C. Cir. 1982).

[71]It should be noted that the radiation exposure in this instance was not due to participation in nuclear war games but rather resulted from Lombard's participation in the "Manhattan Project." *Id.* at 216. The "Manhattan Project" was a research project aimed at the development of the world's first atomic weapon. Monaco v. United States, 661 F.2d 129, 130 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

[72]690 F.2d at 228 (Ginsburg, J., concurring in part and dissenting in part).

[73]690 F.2d at 218. *See supra* text accompanying note 33.

[74]690 F.2d at 218-19.

[75]431 U.S. 666, 671 (1977). The *Lombard* court actually does not refer to the three factors as derived from *Stencel*, but rather cites various sources for the factors. 690 F.2d at 219 (citing Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980); Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977); United States v. Muniz, 374 U.S. 150 (1963); United States v. Brown, 348 U.S. 110 (1954); Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981) (en banc)). However, because *Stencel* draws the three fac-

federal character of the relationship between the government and the members of its armed forces, the uniform system of compensation provided by Congress in the Veterans' Benefit Act, and the harmful effects that servicemen's tort actions would have on military discipline.[76] The *Lombard* court directly applied these factors to the veteran, but only indirectly applied them to the children.[77] The court determined that because Lombard's injury was incident to service and because the *Stencel* factors were applicable in this situation, the veteran was barred from suit under the FTCA.[78] After making this determination, the court turned to the children's claims and was primarily concerned with whether the children's injuries were derivative of their father's in-service injury. The court used the "genesis" test to conclude that the children's injuries were derived from the father's "incident to service injury."[79]

The "genesis" test, propounded in *Monaco v. United States*,[80] focuses on when the negligent act causing the injury occurred, not the point when the injury actually happened or appeared.[81] The *Monaco* court determined that the negligent act, not the injury, was the proper focal point when dealing with injuries to servicemen's children.[82] In *Monaco*, a veteran who had been exposed to radiation during active service[83] later had a daughter born with a severe birth defect because of the genetic change that the radiation exposure had caused in her father.[84] The *Monaco* court reasoned that, because the daughter's injury was derivative of the negligent act to her father and was not

---

tors together, this Note will focus on the *Stencel* decision and its reasoning supporting the factors.

[76]*See supra* notes 51-67 and accompanying text.

[77]690 F.2d at 221.

[78]*Id.*

[79]*Id.* at 223.

[80]661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982). The "genesis" test was originally formulated in Monaco v. United States, No. 79-0860 (N.D. Cal. Nov. 2, 1979), and then was picked up by the District Court for the Eastern District of New York in *In re* "Agent Orange" Product Liability Litigation, 506 F. Supp. 762, 781 (E.D.N.Y. 1980). Then in *Monaco*, the United States Court of Appeals for the Ninth Circuit reapplied the test in affirming the district court decision. 661 F.2d at 133. It is also interesting to note that the circuit court in *Monaco* cited the *In re Agent Orange* decision in support of its decision to deny Monaco's daughter the right to sue for her injuries. *Id.* at 134.

[81]661 F.2d at 133.

[82]*Id.* at 132-33.

[83]In this case the radiation exposure occurred while Monaco was sitting on bleachers above a laboratory in which research for the development of the first atomic weapon was being conducted. Monaco was never apprised of his exposure to radiation until 1971 when he was informed that he had radiation-induced cancer of the colon. *Id.* at 130.

[84]*Id.* Denise was born with an arterio-venous anomaly. An arterio-venous anomaly is a congenital defect located in the brain consisting of tangled masses of interconnected arteries and veins. HARVEY, JOHNS, OWENS, & ROSS, THE PRINCIPLES AND PRACTICE

a separate and distinct injury, the determinative injury in deciding whether the child had a right of action would be the genetic change in her father.[85] Because the genetic change presumably resulted from a negligent act that occurred while the serviceman was on active duty, the injury was incident to service and recovery was precluded by the *Feres* doctrine.[86]

In reaching its conclusion, the *Monaco* court relied on *United States v. Brown*[87] which had focused on the time the negligent act occurred to find that the serviceman's injury was not incident to service and therefore recovery under the FTCA was permissible. It is ironic that the Court's focus on the negligent act that allowed recovering in *Brown*,[88] precluded the children from recovering in *Monaco* because the "genesis" of their injuries related to their father's active service days. Thus, what had been an expansion device for recovery in *Brown* became a narrowing device in *Monaco*. This anomaly is even more apparent when it is remembered that the Monaco children, like the veteran in *Brown*, were not subject to military discipline, but unlike the veteran, were denied recovery.

The *Lombard* court adopted the *Monaco* reasoning when it held that the Lombard children's suit was barred by the *Feres* doctrine.[89] The court determined that the *Feres* doctrine barred Lombard's recovery under the FTCA; that the children's injuries were derivative of their father's injuries; and therefore, under the genesis test, the *Feres* doctrine also barred the children from recovering under the FTCA.[90] Although this reasoning appears logical at first glance, it is overly simplistic and does not adequately resolve the issues involved in these cases. Therefore, this form of analysis should not be used to bar tort actions by the atomic veterans' children.

B. The Flaw in the Lower Courts' Reasoning

The flaw in the *Lombard* court's reasoning and in the reasoning of the other circuit courts that have barred recovery by children of atomic veterans under the FTCA involves the courts' failure to properly differentiate between two lines of cases dealing with tort recovery by family members of servicemen. The first line of cases involves

---

OF MEDICINE 1523 (19th ed. 1976). The mass had resulted in "three brain hemorrhages, aphasia and other permanent injuries." 661 F.2d at 130.

[85]661 F.2d at 133.

[86]*Id.* at 133-34.

[87]348 U.S. 110 (1954). *See supra* notes 42-50 and accompanying text.

[88]*See supra* notes 47-50 and accompanying text.

[89]690 F.2d at 223.

[90]*Id.* at 226.

direct injuries to the family members and allows recovery not only by the injured parties but also by the servicemen for consequential damages.[91] The second line of cases deals with injuries which are clearly derivative of the servicemen's injuries,[92] but are in the nature of emotional injuries, not physical injuries to the third parties.[93]

In *Hinkie v. United States*,[94] the district court properly discussed these two lines of cases and concluded that the children of any atomic veteran could bring an action under the FTCA.[95] The district court reasoned that, although the Hinkie children's injuries were derivative of the serviceman's injury, they were also direct physical injuries and, therefore, did not fit "neatly into either line of cases."[96] Consequently, the district court in *Hinkie* treated the children's claim as novel, deserving full analysis under the *Stencel* factors. The court expressly rejected the "genesis incident to service" test of *Monaco* as an "oversimplification" that would allow courts to "avoid the necessary analysis of policies underlying the *Feres* doctrine which the Supreme Court requires in determining its application to novel cases."[97]

---

[91]*See* Hinkie v. United States, 524 F. Supp. 277, 280 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983). An example of these types of cases include a situation where a sergeant was able to bring an action under the FTCA for injuries to his wife resulting from negligence in the delivery of a child in an Army hospital. Costley v. United States, 181 F.2d 723 (5th Cir. 1950). Note that under a "but for" analysis, *see supra* note 49, recovery probably would have been denied, as but for the serviceman's active duty status the woman would not have been in an Army hospital.

[92]*See* Hinkie v. United States, 524 F. Supp. 277, 280-81 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983).

[93]*Id.*; *see* De Font v. United States, 453 F.2d 1239 (1st Cir.), *cert. denied*, 407 U.S. 910 (1972) (serviceman's wife's action for mental anguish and child's action for loss of companionship); Wisniewski v. United States, 416 F. Supp. 599 (E.D. Wis. 1976) (serviceman's wife's action based on government's failure to diagnose and treat husband's illness, which resulted in husband's illness causing marital disharmony).

[94]524 F. Supp. 277, 280-81 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983). Hinkie had been exposed to radiation during the 1955 Army nuclear testing in Nevada. Hinkie later had two sons, Paul and Timothy, both of whom suffered from severe birth defects. Paul's defects included "Rubenstein-Taybies Syndrome, lack of joints in his thumbs, constant uncontrollable twitching of his eyes, severe mental retardation and photophobia." *Id.* at 279. Timothy was born "with severe and disabling birth defects, including but not limited to the lack of an esophagus and esophageal fistula which caused him pain, mental anguish and his death on January 7, 1966." *Id.*

[95]*Id.* at 284. Even though the district court's decision was eventually reversed on appeal, this author believes the reasoning and analysis used by the district court is the appropriate approach to follow and will therefore discuss the court's opinion at length.

[96]*Id.* at 281.

[97]*Id.* at 282. In the subsequent appeal to the Third Circuit, the Court of Appeals failed to address this aspect of the problem and reversed on the basis of the effect the suits would have on military discipline. 715 F.2d 96, 97 (3d Cir. 1983). For a discussion of this factor, see *infra* notes 122-43 and accompanying text.

The *Lombard* court, noting these two lines of cases, rejected the view that the children's injuries did not fall neatly into the derivative injury type cases. The court observed that the "direct injuries" allowing recovery involved no injury to the servicemen, whereas the "derivative injuries" all resulted from a direct injury to the servicemen.[98] The *Lombard* court concluded that the facts in *Hinkie* clearly fell under the " 'derivative injury' line of cases"[99] because the children's injuries resulted from the father's injury. The problem with this conclusion is that the *Lombard* court failed to consider the "direct physical injury" aspect of the children's cases. Because the children have suffered direct physical injuries themselves, although derivative of the fathers' injury, the children's cases should be treated as novel and separately scrutinized under the *Stencel* factors. By acknowledging the derivative but physical nature of the atomic veteran's children's injuries, the district court in *Hinkie* permitted this type of scrutiny to occur. Such scrutiny is desirable because of the children's novel situation and, therefore, the district court's approach in *Hinkie* is the better reasoned and more just approach.

C. Do the Stencel *Factors Apply to Claims of Atomic Veterans' Children?*

The *Lombard* court used the *Stencel* factors to analyze the relationship between the servicemen and the government and concluded that the *Feres* doctrine was applicable to and barred recovery by the children.[100] The district court in *Hinkie v. United States*[101] reached a contrary result by applying the three *Stencel* factors directly to the children's claims.[102] The relationship between the children and the government does not justify expanding the *Feres* doctrine to bar recovery by the atomic veterans' children. None of the three *Stencel* factors, which form the underlying rationales for the *Feres* doctrine, apply to the children's claims.

1. The Distinctly Federal Character of the Relationship.—The first

---

[98]690 F.2d at 225.

[99]*Id.* The *Lombard* court also noted that the district court opinion in *Hinkie* was in conflict with its own circuit court's decision in Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981) (en banc). Although this is true, the validity and persuasiveness of the district court's reasoning in *Hinkie* is a force that the courts have failed to adequately deal with.

[100]690 F.2d at 218-26. The court did not expressly apply the *Stencel* factors to the children's claims but rather applied the factors to the father's claims and denied him recovery. The children then were barred from recovery because their injuries were declared derivative of their father's. Thus, the *Stencel* factors were applied to the children's claims albeit in an indirect manner. *Id.*

[101]524 F. Supp. 277 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983).

[102]*Id.* at 282-85. *See supra* notes 94-97 and accompanying text.

Stencel factor is based on the distinctly federal character of the relationship between the soldier and the government, which is governed by federal law.[103] As the district court in *Hinkie* noted, there is no distinct federal relationship between the child and the government because the child is simply a civilian.[104] The court pointed out that had a civilian living near the nuclear test sites brought an action against the government, the suit would have been allowed and state law would have been applied.[105] Thus, the argument that suits should be barred because the government's liability should not depend on the differing state laws[106] carries little weight because precisely the same factor determines civilians' rights to recover against the government. This result is especially true for FTCA actions because the FTCA explicitly dictates that state law is the applicable law.[107]

The government can argue that for the sake of uniformity servicemen should be limited to recovery under the Veterans' Benefit Act, and their children should not be allowed to recover under varying state laws for derivative injuries.[108] Perhaps this argument carries some weight because the Veterans' Benefit Act does at least provide a mechanism by which the servicemen can seek recovery for their injuries;[109] however, applying this rationale to bar the children's right

---

[103]431 U.S. 666, 671 (1977).

[104]524 F. Supp. at 282-83.

[105]*Id.* at 283.

[106]*See* Feres v. United States, 340 U.S. 135 (1950).

[107]*See supra* note 22 and accompanying text.

[108]*See supra* note 35 and accompanying text.

[109]38 U.S.C. § 610 (Supp. V 1981). The remedies provided the servicemen under the Veterans' Benefit Act have, in the past, been totally inadequate. As of 1981, the Veterans' Administration had almost a 99% denial rate on compensation claims for injuries alleged to have been caused by radiation exposure in nuclear tests. Favish, *supra* note 1, at 957. According to the National Veterans Law Center, over 2000 claims for compensation related to the war games have been rejected by the Board of Veterans Appeals while only 13 claims have been granted by the Board. Washington Post, Aug. 11, 1982, at A12, col. 2.

Congress recently enacted an amendment to the Veterans' Benefit Act that may make the servicemen's recovery for radiation exposure injuries easier. 38 U.S.C. § 610 (Supp. V 1981). The amendment was designed to provide health care to veterans who were exposed to either radiation during the war games or Agent Orange and other chemical defoliants used in Vietnam. The problems of recovery facing both types of injured veterans were similar, such as proving their injuries were indeed the result of exposure to radiation or chemical defoliants. The amendment may eliminate this burden as the drafters intended to grant health care to the veteran "if it is found that the veteran, during active duty, *may* have been exposed to dioxin or was exposed in Vietnam to any toxic substance in a herbicide or defoliant used in connection with military purposes there, or to radiation from the detonation of a nuclear device." 127 CONG. REC. S11572 (Oct. 16, 1981). Congress also provided that the veteran's service records need only show that he was in Vietnam during the period the chemicals were used in order to recover under the Act, thus eliminating the difficulty in determining

to a tort action is totally unfounded. To begin with, as the district court in *Hinkie* noted, the children are not servicemen, and they have no federal relationship to the government other than perhaps being citizens of the United States.[110] Secondly, while the servicemen do have a remedy under the Veterans' Benefit Act, the children have no remedy left to them except a questionable state action against the manufacturer of the weapons involved.[111] Requiring the children to bring an action against the weapons manufacturer, but not the government, is analogous to telling a person who is negligently shot by an individual to sue the manufacturer of the bullet and not the person who was mishandling the weapon. There is serious doubt whether a case against a weapons manufacturer would be successful because the manufacturing of the weapon was not the negligent act that led to the injuries.[112] Similarly, it is the misuse of the weapons, mismanagement of the nuclear tests, and the government's negligence in failing to warn the men of the dangers that caused the children's injuries. Thus, if the children are barred from suing the government then they actually are barred from any recovery at all, and the government is

---

actual usage patterns of Agent Orange and other dioxin-contaminated defoliants and herbicides in Vietnam. *Id.* at 11574. Radiation veterans need only show that their injury is a type that radiation could cause, such as cancer as opposed to a broken leg. The presumption regarding Agent Orange, however, is effective for only about a two-year period until the first report of a Veterans' Administration epidemiological study is submitted. This study is being conducted pursuant to section 307(b)(2) of Public Law 96-151. After the report comes out, it has been suggested that Agent Orange veterans also will have to show their injuries are of the type Agent Orange would cause. Presently such a showing is not necessary barring any obvious false claims such as a broken leg. 127 CONG. REC. S11572-74 (Oct. 16, 1981).

[110]524 F. Supp. at 282-83. In *Hinkie*, the two children were not even born when Hinkie was on active duty. *Id.* at 282.

[111]Even this approach is not possible where the exposure is a result of the government's research on the "Manhattan Project" because the government was the manufacturer, *see supra* note 71, unless perhaps some sort of dual capacity doctrine were adopted, allowing the government to be sued as the manufacturer of the weapons. See Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952), for a description of the dual capacity doctrine.

[112]The approach of suing the government contractor has been attempted in connection with the chemical Agent Orange. The manufacturers of Agent Orange raised not only the defense that any negligence was the government's but also the government contract defense. This latter defense, argues that, because the government controls and dictates the manufacturing and use of the weapon or chemical, the manufacturer is immune from liability because the government is acting in a capacity that renders it immune from liability under the theory of sovereign immunity and the *Feres/Stencel* doctrine and this immunity is passed on to the manufacturer. Hanes, *Ageny Orange Liability of Federal Contractors*, 13 U. TOL. L. REV. 1271, 1274-76 (1982). Hanes predicts that the manufacturers will succeed under the government contract theory. *Id.* at 1279. Thus, it is unlikely that a suit against the manufacturers of atomic weapons would be successful because of the government contract and the lack of negligence on the part of the manufacturer.

freed from assuming responsibility for injuries resulting from its negligence.

2. The Veterans' Benefit Act as an Upper Limit to Governmental Liability.—The second *Stencel* factor states that the Veterans' Benefit Act establishes the upper limit of the government's liability for service-related injuries.[113] Again, this is not applicable where the children of servicemen are concerned. The government has no liability at all towards the children under the Veterans' Benefit Act because it does not cover their injuries.[114] The children are suing for physical injuries *they* sustained, not for injuries the servicemen sustained. If the children involved were the children of civilians, they would be able to bring actions under the FTCA for their own injuries.[115] However, under the reasoning of the *Lombard* court, the children of servicemen are barred from seeking recovery for their injuries. This result allows the government to place the entire burden of its negligence on the shoulders of the servicemen, who are actually among the injured parties, and their families. This result contravenes both tort law and the FTCA.

One of the basic goals of tort law is the "allocation of losses arising out of human activities."[116] Usually the tort-feasor is held liable when he has departed from a reasonable standard of care.[117] Application of the *Feres* doctrine to the atomic veterans' children, however, precludes them from even bringing an action against the government to determine if liability exists.[118] The FTCA waives government immunity from suit for negligent acts or omissions of federal employees acting in the scope of their employment.[119] The government's liability is to be "in the same manner and to the same extent as a private individual under like circumstances."[120] Because the object of both tort law and the FTCA is to allocate losses to the tort-feasor, the atomic veterans' children should be permitted to bring actions against the government based on the children's own physical injuries, just as any other civilian could. In this way, both the objectives of tort law and the FTCA would be furthered.

Also, because the children receive no benefits under the Veterans' Benefit Act, there is no problem of a double recovery. The government could compensate the soldiers through the Act, and the children through court actions. Thus, the Act would still serve as an upper

---

[113]431 U.S. at 671.

[114]*See supra* note 109.

[115]524 F. Supp. at 283.

[116]Prosser, *supra* note 18, at 6.

[117]*Id.*

[118]*See* cases cited *supra* note 5.

[119]28 U.S.C. § 1346(b) (1976).

[120]*Id.* § 2674.

limit to the government's liability for the servicemen's injuries, and the children would be able to seek judicial recovery for their own injuries. Furthermore, allowing the children an action under the FTCA would be consistent with the purpose behind the FTCA which is to alleviate the hardships of sovereign immunity[121] by making the government assume responsibility for the results of its negligent acts.

3. The Breakdown in Military Discipline.—The final *Stencel* factor concerning the harmful effects on military discipline if suits are allowed by servicemen's children is unpersuasive for a number of reasons when applied to atomic veterans' children. First, the courts that have relied on this factor[122] have failed to acknowledge that if a civilian unrelated to a serviceman were injured by the nuclear arms tests, military orders would still come under court review.[123] There would still be second guessing of orders, military men testifying for and against each other, and a general review of the military's actions in regard to the events that led to the civilian's injury. The risk of a breakdown in military discipline would be just as great in a case involving a civilian who was not related to a serviceman as one who was related to a serviceman.

Also, the effect on military discipline is only a potential problem and a remote one at that. The actions brought by the children often occur several years after the military orders have been given. "The extended interval between the issuance of the orders and the appearance of the injuries dilutes the argument that an airing in court of . . . family members' claims would occasion genuine harm to the command structure of the armed forces."[124] In addition, "[s]uits for indirect consequences of military orders, contrary to those for direct consequences, are brought by non-military personnel who are not subject to military authority, and therefore pose less of a threat to the maintenance of military discipline."[125] Thus, an attenuated threat of a breakdown in military discipline should not act as a bar to the children's right to a tort action under the FTCA.

Finally, some of the courts relying on this factor have improperly stated that the "Supreme Court has construed the FTCA to subordinate the interests of children of service personnel to the exigencies of military discipline."[126] In one such case, *Mondelli v. United States*,[127]

---

[121]*See supra* note 21 and accompanying text.

[122]*See, e.g.*, Hinkie v. United States, 715 F.2d 96 (3d Cir. 1983).

[123]*See* 524 F. Supp. at 284.

[124]Lombard v. United States, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part).

[125]Note, *The Effect of the* Feres *Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241, 1265 n.156 (1982).

[126]Hinkie v. United States, 715 F.2d 96, 99 (3d Cir. 1983) (quoting Mondelli v. United States, 711 F.2d 567, 570 (3d Cir. 1983)).

[127]711 F.2d 567 (3d Cir. 1983).

the court stated that the soundest reason supporting the *Feres* doctrine is the relationship between the soldier and his superiors.[128] In a footnote, the court noted that of the three rationales outlined in *Stencel*, only the necessity for maintaining military discipline applied in this case,[129] because the plaintiff was not in the military herself and because the United States conceded that veterans' benefits were not available to her.[130] Thus the court relied solely on the military discipline factor in concluding that the plaintiff could not pursue an action under the FTCA.

The court acknowledged that "[r]arely does the law visit upon a child the consequences of actions attributed to the parents,"[131] citing the Supreme Court decision of *Trimble v. Gordon*.[132] However, the court went on to state that the Supreme Court has subordinated the interests of the veterans children to the interest of military discipline.[133] Notably, the court cites no authority for this proposition but presumably relies on its earlier discussion of *Stencel Aero Engineering Corp. v. United States*[134] and *Chappell v. Wallace*[135] as support for this statement.

While the *Mondelli* court correctly pointed out that the children's actions would question the acts of military personnel,[136] just as if the veterans brought the actions, the court failed to acknowledge the differences in the situations presented by *Stencel* and *Chappell*. First in *Stencel*, the Court was dealing with a contractual relationship and noted that "[s]ince the relationship between the United States and [Stencel was] based on a commercial contract, there [was] no basis for a claim of unfairness" in the Court's denial of Stencel's indemnity action against the government.[137] The Court noted that Stencel had an opportunity to take into account the risk of an action against it in negotiating its contract and thereby protect itself.[138] In the cases involving servicemen's children, however, there is no opportunity for

---

[128] *Id.* at 568.

[129] *Id.* at 569 n.5.

[130] *Id.* In *Mondelli*, the plaintiff was a 22-year-old civilian who was born with retinal blastoma, a genetically transmitted cancer of the retina. The defect was allegedly caused by the plaintiff's father's exposure to radiation during his participation in nuclear tests while on active military duty. *Id.* at 568.

[131] *Id.* at 569. It should be noted that in the radiation cases, the parents involved did nothing but follow orders. Thus, it is absurd to suggest that "the consequences" of the parents acts should be imposed on their children. The veterans in these cases were victims, as were the children.

[132] 430 U.S. 762 (1977) (dealing with the rights of illegitimate children).

[133] 711 F.2d at 570.

[134] 431 U.S. 666 (1977).

[135] 103 S. Ct. 2362 (1983).

[136] 711 F.2d at 569.

[137] 431 U.S. at 674.

[138] *Id.* at 674 n.8.

the serviceman or the children to protect themselves against loss through contract negotiations. Thus, presumably a claim of unfairness in result is appropriate and notably several federal courts have conceded that the results reached in these cases appear "harsh" and "unjust."[139] The language in *Stencel* indicates the Supreme Court's willingness to consider the fairness of the result reached; therefore, lower federal courts should also consider this as a factor.

The *Mondelli* court's reliance on *Chappell* was similarly misplaced. While *Chappell* did affirm the *Feres* doctrine as applied to servicemen, it made no mention of the doctrine's application to servicemen's children.[140] Also the Court was properly concerned with the effects the *Chappell* action would have on military discipline in that the action was brought by enlisted Navy men against their superior officers for alleged acts of discrimination in making duty assignments and performance evaluations.[141] It is also significant that the Supreme Court once more noted that other avenues of relief were available to the enlisted men.[142] Thus, there is little or no similarity between the *Chappell* situation and the situation of the atomic veteran's children.

First the children are not servicemen, and while their action may result in a review of military decisions, those decisions were made years ago. Second, the children are not challenging the acts of individual officers, but rather the entire plan, scheme and method utilized by the Army and Department of Defense in conducting the nuclear tests. Thus, the children's legal actions are really urging and encouraging the government, as a unit, to be sure that its actions are taken with the welfare of the men involved in mind. In this regard, the children's legal actions would serve the public policy goal of providing the government an incentive to assure the safety of its troops in non-combat testing situations, especially where hazardous substances are involved.[143] Third, the children currently have no other means of redress available to them. This factor has repeatedly been mentioned by the Supreme Court and should not be ignored by the lower courts when applying the *Stencel* factor analysis.

Taken as a whole, the reasoning of the Court in *Stencel* for expanding the *Feres* doctrine to a third party's derivative action is not applicable where children of servicemen are concerned. First, there is no distinctly federal relationship that exists between the children

---

[139]*See, e.g.*, Hinkie v. United States, 715 F.2d 96, 98 (3d Cir. 1983); Mondelli v. United States, 711 F.2d 567, 569 (3d Cir. 1983); Lombard v. United States, 690 F.2d 215, 227 (D.C. Cir. 1982).

[140]103 S. Ct. 2362 (1983).

[141]*Id.*

[142]*Id.* at 2366-67.

[143]*See infra* note 167 and accompanying text.

and the government; second, the children cannot recover under the Veterans' Benefit Act and, therefore, have no reasonable remedy available to them; third, the effects on military discipline are no different when servicemen's children bring actions than when a civilian unrelated to a serviceman brings such an action. Because the children have no other source of recovery and because the *Stencel* factors are not applicable to them, the *Feres* doctrine should not be extended to bar FTCA actions by the servicemen's children.

IV. Alternate Theories Allowing Relief Under the FTCA

A. Governmental Post-Discharge Negligence

Under the present *Lombard* type derivative injury approach, the atomic veterans' children have been denied recovery under the FTCA. An alternative argument for the children consists of resting their suit on the government's failure to warn the servicemen of the harmful effects of radiation *after* their discharge from the service. This argument was presented in *Lombard* and rejected by the majority.[144] The court concluded that the negligent act began before Lombard's discharge and continued to the present because Lombard conceded "that the Army knew of the potential dangers involved in exposing servicemen to radioactive substances at the time of the exposure itself."[145] The negligent act, therefore, did not occur after Lombard's military service ended. However, the court acknowledged that if the government had learned of the potential dangers after Lombard's discharge and had failed to warn him of the harmful effects, then a separate tort would have occurred and the action would be allowed.[146]

Judge Ginsburg's dissent in *Lombard* suggests that Lombard should have been permitted to develop and restate the claim regarding post-discharge negligence.[147] Ginsburg noted that *Broudy v. United States*[148] "suggested that the failure to warn a veteran of radiation's

---

[144]690 F.2d at 220-21.

[145]*Id.* at 220.

[146]*Id.* The court noted that a district court in the District of Columbia Circuit had allowed such a claim in Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979). The serviceman in *Thornwell* had been given doses of LSD by the government in an attempt to get him to confess to the theft of classified documents. *Id.* at 346.

[147]690 F.2d at 230-31 (Ginsburg, J., concurring in part and dissenting in part) (citing Broudy v. United States, 661 F.2d 125 (9th Cir. 1981)).

[148]661 F.2d 125 (9th Cir. 1981). In *Broudy* a serviceman was exposed to radiation during maneuvers near the Nevada nuclear test site. He was never told of the dangers to his health or given an opportunity to decline to participate in the maneuvers. Broudy was discharged from the service in 1960 and was then diagnosed as having low-level radiation induced cancer which resulted in his death in 1977. Broudy's wife and children brought an action under the FTCA claiming the government was negligent in exposing Broudy to the radiation and negligent in failing to warn Broudy of health prob-

potential effects might constitute an independent, post-service negligent act if the government learned of the danger after the veteran left the armed forces."[149] Ginsburg went on to say that Lombard was not informed enough to be able to "state with any degree of precision whether, or the extent to which, the government's knowledge of such risks increased" after Lombard's discharge.[150] Under Judge Ginsburg's rationale, the government's increased awareness of danger after a serviceman's discharge could give rise to a separate tort if the government failed to warn of the dangers of radiation exposure that it subsequently discovered. Thus, atomic veterans' children would be allowed to bring suit for injuries based on the government's post-discharge negligence. The *Lombard* majority seemingly would agree with this result so long as the children can show separate post-discharge negligence.[151]

One problem with the post-discharge negligence argument is that it would result in inconsistent results because servicemen's children born *before* the servicemen's discharge would still be denied the right to recovery. However, the non-derivative injury argument used by the district court in *Hinkie*,[152] and the willful and wanton negligence argument[153] should provide all children an opportunity to obtain judicial relief.

B. Workers' Compensation and Willful and Wanton Negligence

The similarities in purpose between the Veterans' Benefit Act and Workers' Compensation Act are striking.[154] The Court in *Stencel* stated that the Veterans' Benefit Act was designed to set an upper limit to the government's liability; thus, under *Stencel* and *Feres*, the benefits received under the Act are considered to be the servicemen's exclusive remedy against the government, although the Act itself does not claim to be an exclusive remedy.[155] In comparison, workers' compensation statutes often expressly provide that the statutory remedies

---

lems after his discharge. The court dismissed the negligent exposure claim but allowed the post-discharge negligence claim. *Id.* at 126-29.

[149]690 F.2d at 230 (citing Broudy v. United States, 661 F.2d 125, 128-29 (9th Cir. 1981)).

[150]690 F.2d at 230.

[151]*See supra* text accompanying note 146.

[152]*See supra* notes 91-99 and accompanying text.

[153]*See infra* notes 154-67 and accompanying text.

[154]The *Lombard* court acknowledged this similarity in purpose. 690 F.2d at 219. Both Acts provide a no-fault remedy in an employment situation because, in essence, the serviceman is an employee of the federal government. *See supra* note 56 and accompanying text.

[155]*See* Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977); Feres v. United States, 340 U.S. 135 (1950). *See supra* note 40.

are to be the worker's exclusive remedy for injuries arising out of the employment situation.[156] Yet courts have allowed employees to recover damages beyond the workers' compensation benefits when the employers' "conscious indifference to the physical safety of his men was so outrageous that an intent to injure could be readily inferred."[157] It has been stated that

> [a]n employer who knows for a fact that if certain conditions are allowed to exist or if *certain changes* are put into effect, harm will befall a particular employee or any one of a group of employees, is certainly not far removed, in terms of moral blameworthiness, from the boss who "clobbers" a worker with a baseball bat.[158]

It can be argued that the government's "conscious indifference" to the servicemen's safety was willful and wanton conduct. The Atomic Energy Commission (AEC) originally was responsible for the safety standards used in the 1950's war games, but this responsibility was turned over to the Department of Defense (DOD), upon the DOD's request, so that the DOD could make the war games more realistic. The DOD felt the AEC standards were too restrictive and wanted to attain conditions more closely resembling those of true war.[159] The

---

[156]Tomita, *The Exclusive Remedy of Workers' Compensation for Intentional Torts of the Employer*: Johns-Manville Products v. Superior Court, 18 CAL. W.L. REV. 27 (1981).

[157]Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C. INDUS. & COM. L. REV. 555, 563-64 (1963). The willful and wanton language often is automatically associated with the concept of punitive damages. However, the two concepts exist separately, and one does not automatically give rise to the other. Willful and wanton conduct may justify awarding punitive damages, imposing broader duties, extending liability, and may avoid the defense of contributiory negligence. Prosser, *supra* note 17, at 184-85. In the case of the serviceman's children, the willful and wanton conduct gives the children a right to a tort action against the government when an action may otherwise be denied.

[158]Page, *supra* note 157, at 564 (emphasis added); *see* Collins v. Dravo Contracting Co., 114 W. Va. 229, 171 S.E. 757 (1933).

[159]Favish, *supra* note 1, at 944-47 n.39. The AEC required troops to be at least seven miles from ground zero (the point of detonation) at detonation time. The DOD wanted this distance reduced to 7000 yards (3.9 miles). The Washington Post, Aug. 11, 1982, at A12, col. 2, reports one instance where a soldier was actually close enough to be blown from his trench by the force of the blast. The AEC also limited each individual's exposure to 3.9 roentgens (r.) of gamma radiation per 13 weeks. They monitored this level by giving each soldier his own badge and had the troops advance behind AEC monitoring personnel. The DOD wanted to increase the exposure level to 6r. per soldier (in some cases exposure was as high as 100r.) and advance the troops without the hindrance of monitoring personnel. The AEC granted the DOD permission to decrease the distance between the troops and "ground zero" at detonation time, but only if precautions were taken to ensure troop safety. However, they refused to condone the increased exposure level and told the DOD that AEC personnel would be unavailable on the test date so the DOD would have to conduct the monitoring

government was warned that the DOD's relaxation of AEC standards could be dangerous, but the standards were relaxed anyway.[160] The government also had access to several medical publications warning of the hazards related to radiation exposure.[161] Yet, the government exposed soldiers to radiation, paying little or no attention to safety precautions, all in the name of realism.[162] This lack of attention to safety standards evidences a "conscious indifference to the physical safety" of the men involved.

Based on such evidence, the courts could read an exception into the *Feres* doctrine, as courts have done in workers' compensation

---

of radiation levels. In 1953, the DOD assumed full responsibility for safety standards and only gave the AEC a safety plan for informational purposes. A letter dated October 15, 1952, from Major General H. B. Loper to Brigadier General K. E. Fields stated that if "the safety standards of the DOD are less conservative than those established by the AEC, and if accident or criticism result, the DOD will be prepared to make a public announcement of those facts." Favish, *supra* note 1, at 947 n.39. In spite of several complaints put forth by the AEC, no public announcements were forthcoming, and only recently have the facts surrounding the nuclear tests been made known. *Id.* at 933.

[160]Favish, *supra* note 1, at 944 n.39.

[161]*See, e.g.*, Folley, Borges, & Yamawaki, *Incidence of Leukemia in Survivors of the Atomic Bomb in Hiroshima and Nagasaki, Japan*, 13 AM. J. MED. 311 (1952) (discussing the increased incidence of leukemia in the Japanese atomic bomb survivors); Furth & Furth, *Neoplastic Diseases Produced in Mice by General Irradiation with X-rays*, 28 AM. J. CANCER 54 (1936) (discussing increased ovarian tumors and lymphatic cancer among irradiated mice); Martland, *The Occurrence of Malignancy in Radioactive Persons*, 15 AM. J. CANCER 2435 (1931) (discussing the development of cancer in watch dial painters who used radium paint); Muller, *Artificial Transmutation of the Gene*, 66 SCIENCE 84 (1927) (stating that x-rays could cause gene mutations in drosophila flies); Uphoff & Stern, *The Genetic Effects of Low Intensity Irradiation*, 109 SCIENCE 609, 610 (1949) (stating that there was no threshold below which radiation failed to induce mutations).

Although this information at first glance appears harmful to the post-discharge negligence standard, it should be remembered that the importance rests on the degree to which available information changed in reliability, thus increasing awareness or the discovery of new information as to the harmful effects of radiation is enough to create a post-discharge duty to warn. *See supra* notes 144-51 and accompanying text.

[162]During the atomic war games troops were placed anywhere from 12 to 1.5 miles from the explosion site. In one test, the Chief of the Armed Forces Special Weapons project proposed to have an army battalion (approximately 1100 men) dig in as close as permissible to the explosion site. After the explosion, the battalion was to march through the detonation site and join up with an airborne company (approximately 200 men) that was to be dropped in the area of "ground zero." This was done in order to emphasize to the troops "the high degree of safety in entering the area of ground zero immediately following an air burst of atomic bomb." Favish, *supra* note 1, at 946 n.39.

In assuming responsibility for troop safety, the DOD failed to take all the precautions the AEC had taken. Many soldiers did not have their own radiation badges; no protective clothing was issued; decontamination consisted of sweeping contaminated dust off personnel and equipment with brooms; and the soldiers were not warned of the true hazards of radiation exposure. *Id.* at 949-52.

cases,[163] to allow the children of atomic veterans to seek recovery for their injuries. A similar workers' compensation argument was unsuccessfully used in *Lewis v. United States*[164] by the wife of a serviceman who died in a plane crash. The *Lewis* case, however, did not involve an incident where the government acted in "conscious indifference" to the welfare of the serviceman. Rather, the case was based on the negligent and wrongful acts of government employees in maintaining, operating, and controlling the aircraft.[165] Thus, the case can be distinguished from the radiation cases where the government acted in a manner expressing wanton disregard for the safety of the servicemen involved.

Imposing this type of liability on the government is justified because the government waived its sovereign immunity through the FTCA. Under this waiver of immunity, the government is liable "in the same manner and to the same extent as a private individual under like circumstances," with certain exceptions.[166] The Veterans' Benefit Act and Workers' Compensation Acts are statutory remedies that take away the employee's right to tort actions, but courts do recognize exceptions to this waiver of tort action. The government, having consented to waive its sovereign immunity and be subject to the same liabilities as private individuals, should be treated like a private employer and be liable for acts of negligence that are willful and wanton and display a reckless disregard for human life.

Public policy and tort theory also support a right of action against the government when the government has acted in wanton disregard of servicemen's safety. In tort actions courts focus on the underlying economic theory of compensation; however, the deterrent effect of knowing that liability may result from one's negligent acts is another important purpose of tort law.[167] Servicemen need to have their health and safety protected as much as employees of civilian employers. The actions of the government in the radiation exposure incidents illustrates failure of the government to provide for the safety of the servicemen. By judicially expanding the *Feres* doctrine to deny the atomic veterans' children a right to recover for their injuries, the courts are failing to provide the government any incentive to ensure that the servicemen have adequate protection in future experiments involving potentially harmful substances. Thus, allowing the atomic veterans' children the right to pursue tort actions would promote the public policy of encouraging employers, including the government, to

---

[163]*See supra* text accompanying notes 156-58.

[164]663 F.2d 889 (9th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982).

[165]*Id.* at 890.

[166]28 U.S.C. § 2674 (1976).

[167]Prosser, *supra*, note 18, at 5.

take reasonable precautions to protect the health of their employees and, thereby, protect the health of the employees' unborn children.

V. The Need for Legislative Action

Although the rationale of the district court in *Hinkie*[168] permits the servicemen's injured children to bring an action against the government under the FTCA, it does not solve the burden of proof problem the children will face when their case goes to trial. The elements of negligence are a legally recognized duty to conform to a standard of conduct to protect others from unreasonable risk, a failure to conform to the required standard, a reasonably close causal connection between the conduct and the resulting injury, and an actual loss or damage to the interests of another person.[169] All these elements must be proven before recovery is granted.

One of the greatest problems of proof facing the atomic veterans' children will be establishing a causal connection between their fathers' exposure to radiation and their resulting birth defects. Birth defects can be caused by any number of genetic problems and in utero occurrences, such as the mother's ingestion of a variety of drugs.[170] Often the only evidence available is "circumstantial evidence based upon expert opinion and statistical probabilities."[171] In addition to not being able to show that radiation exposure of the father actually caused their injuries, the children may not be able to prove that the father was indeed exposed to radiation.[172] These problems could be solved by shifting the burden of proof for causation from the plaintiff to the defendant.

Courts have permitted such a shift in the burden of proof on causation when an evidentiary void exists and the plaintiff can prove the elements of duty, breach of that duty, and an injury.[173] It has not been necessary for the defendant to actually have access to a greater volume of information than the plaintiff for the shift to occur.[174] Courts have also held that where a defendant's conduct actually helped create the evidentiary void, the burden of proof would be shifted to the

---

[168]524 F. Supp. 277 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983). *See supra* notes 91-98 and accompanying text.

[169]Prosser, *supra* note 17, at 5, 143.

[170]*See* Favish, *supra* note 1, at 964-65, 968-69.

[171]*Id.* at 964-65.

[172]The government failed to keep central records of war game participants, and millions of general files were destroyed by fire in 1973. *Id.* at 956-57.

[173]Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948).

[174]Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 593, 607 P.2d 924, 929, 163 Cal. Rptr. 132, 137, *cert. denied*, 449 U.S. 912 (1980).

defendant.[175] In the radiation cases, the government's conduct resulted not only in the soldier's exposure to harmful dosages of radiation, but also in the evidentiary void that now exists. The government knew at the time the atomic war games took place that radiation exposure was harmful to humans and could lead to future problems for both servicemen and their offspring.[176] Knowing this, the government still failed to develop a proper monitoring system to determine each soldier's level of radiation exposure. In fact, the DOD actually lessened the monitoring standards of the AEC.[177] Additionally, the government kept no central file system on the participants of the war games and lost millions of general files in a subsequent fire.[178] The government's actions have resulted in an evidentiary void that makes it virtually impossible for children to prove that their fathers were exposed to radiation and that the level of radiation exposure was sufficient to result in the genetic changes that led to the children's birth defects. Thus, under this fact situation, where the defendant has actually created the evidentiary void, the government and not the children should carry the burden of proof on causation.

However, shifting the burden of proof still may not assure recovery to the children. The government can still argue that even if the servicemen were exposed to radiation, the children cannot prove that their birth defects were caused by that radiation exposure. The government also can claim that even if the injuries were caused by radiation, recovery should not be allowed because it might "open the door for governmental liability to countless generations of claimants having ever diminishing genetic relationship to the person actually injured."[179] These arguments, combined with the federal courts reluctance to deal with this issue,[180] indicate the need for remedial action beyond the judicial level.

Congress has already acknowledged that the nuclear arms tests have resulted in injuries to the servicemen and has extended the Veterans' Benefit Act to compensate the soldiers for these injuries.[181]

---

[175]Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465 (1970). In *Haft* a father and son died in the hotel's swimming pool. The hotel had failed to provide a lifeguard for its patrons and it was reasoned that if a lifeguard had been provided, the plaintiff could have used the lifeguard's testimony to prove what actually led to the deaths. Thus, the court viewed the failure to provide a lifeguard as depriving the plaintiffs of a means of proving the facts of the case and shifted the burden of proof to the defendant.

[176]*See supra* note 161 and accompanying text.

[177]*See supra* notes 159-62 and accompanying text.

[178]*See supra* note 172.

[179]*In re* "Agent Orange" Product Liability Litigation, 506 F. Supp. 762, 781 (E.D.N.Y. 1980).

[180]*See* Hinkie v. United States, 715 F.2d 96 (3d Cir. 1983).

[181]*See supra* note 109.

A similar "special remedy" could be made available to the children of the servicemen. Under this plan, the children would need to show that their fathers were in the military and took part in the nuclear war games. The children also could be required to prove that their injury is one that radiation exposure could cause. If the serviceman's military records were among those destroyed by fire, the burden of proof could shift to the government, requiring the government to show that the serviceman in question did not participate in the war games and was not exposed to radiation. Even if the serviceman's records are available, the government should have the burden of proving that the soldier's level of radiation exposure could not have caused the injuries because it was the government's failure to keep proper records on individual levels of exposure that created the evidentiary void. Thus, once it is shown that the soldier did participate in the war games and that his child has birth defects that are known to be caused or could be caused by exposure to radiation, the child would be entitled to benefits.

Congress also could limit recovery to the first generation of children.[182] In this way, at least the servicemen's children will be compensated for their injuries, and the compensation will be somewhat uniform. At the same time, the government could avoid liability for "countless generations of claimants." Legislation also would allow the government to avoid lengthy and expensive litigation.

Finally, if Congress does not choose to provide for compensation to the children through special legislation, then Congress should redraft the FTCA to permit recovery by the children in federal courts. The Supreme Court has construed the FTCA as denying recovery for all injuries incident to service.[183] However, the Act actually denies recovery only under limited circumstances, specifically those injuries arising out of combat activities during time of war or incurred in a foreign country.[184] The lower courts have used the *Feres* doctrine to deny servicemen's children the right to recover under the FTCA. If Congress had intended this type of interpretation, then it would seem that Congress would have made a sweeping denial of recovery rights to soliders instead of the very specific ones that it made.[185] In view

---

[182]To further limit the application of this remedy, Congress could even include language indicating that once a serviceman had one child with birth defects, the serviceman would be on notice of the possibility of a problem and should seek genetic counseling. Therefore, any children born later would be said to be born with proper notice to the parents thus barring recovery for subsequent children on the basis of assumed risk. If Congress is unwilling to develop a separate plan for the children, then Congress should consider extending the Veterans' Benefit Act to provide compensation to the children by increasing the serviceman's benefit award.

[183]Feres v. United States, 340 U.S. 135 (1950).

[184]*See supra* note 24 and accompanying text.

[185]*See supra* note 27.

of the Court's development of the *Feres* doctrine, it is time for Congress to address the issue by clarifying the FTCA provisions that deny servicemen the right to bring actions or drafting provisions to allow servicemen's children the right to seek recovery for their injuries in the federal courts.[186]

VI. Conclusion

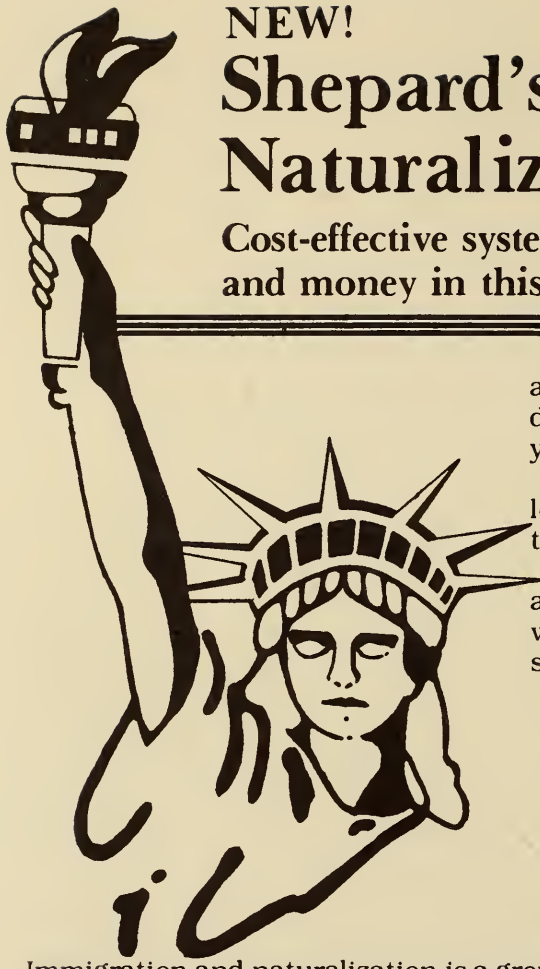
The courts should not extend the *Feres* doctrine to deny servicemen's children the right to bring an action under the FTCA for injuries resulting from the government's negligence in exposing servicemen to harmful radiation while on active duty. Although the original negligent act may be incident to service as described in the *Feres* doctrine, none of the underlying rationales of the doctrine, as enumerated by the *Stencel* factors, apply to the children's claims: The children have no special relationship with the government, they currently have no other feasible source of compensation, and suits brought against the government by "atomic children" will not result in a greater breakdown of military discipline than would suits brought by other civilians for injuries resulting from the nuclear weapons tests. In addition, allowing the suits to be brought would further public policy by making the government accountable for the injuries caused by its tortious acts thereby motivating the government to take action to prevent future injuries to its employees.

In those instances where the children are successful in reaching the trial courts, the government should bear the burden of proving lack of causation because the government created an evidentiary void, making it virtually impossible for the children to prove that their fathers were exposed to a level of radiation sufficient to cause the birth defects. Because liability still may be denied based on the failure of the children to establish that their injuries were actually caused by their fathers' exposure to radiation, Congress should develop a compensation scheme for the injured children. The government was grossly negligent in its management of the war games and should assume the responsibility of its negligence instead of placing the burden on the children or their families. Finally, if Congress chooses not to develop a compensation scheme, it should at least re-evaluate the provisions of the FTCA and amend them to permit the servicemen's children to bring an action under the Act. This way, the innocent victims of the government's quest for knowledge can be compensated for their injuries and suffering.

Sharon L. Hulbert

---

[186] *See* Monaco v. United States, 661 F.2d 129, 134 n.3 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).



NEW!

Shepard's Immigration & Naturalization Citations

Cost-effective system saves research time and money in this specialized field of law.

Now you can be sure your case, statute and administrative decision research is accurate and up to date for any immigration and naturalization problem you're handling.

With this single time-saving source, you can easily locate the information you need, without wading through many separate volumes and series.

Immigration & Naturalization Citations is the first and only comprehensive federal law citation system which helps you deal efficiently with legal problems such as:

- visas
- asylum
- deportation proceedings
- illegal aliens
- marriage of non-citizens to citizens
- other problems of non-citizens and naturalized citizens
- and all other immigration and naturalization matters.

Immigration and naturalization is a growing, lucrative field of practice. But even if you do not specialize, this new citator system helps you handle the occasional immigration case quickly and cost-effectively.

You will benefit from the fast, accurate access it provides to administrative decisions, federal cases, U.S. code provisions and federal regulations as cited in:

- decisions by the U.S. Supreme Court in cases reported in the three series of reports of U.S. Supreme Court cases
- decisions by the lower federal courts in cases reported in the Federal Reporter, Federal Supplement and Federal Rules Decisions
- Immigration & Nationality Decisions
- selected leading law reviews
- and in the U.S. statutes at large.

Shepard's Immigration & Naturalization Citations enables you to expand or limit your search. It can direct you to all the information available . . . or it can help you select and evaluate only the pertinent material you want to consider.

Shepardize® with Shepard's Immigration & Naturalization Citations!

MAIL THIS OBLIGATION-FREE COUPON TODAY.

☐ Please send me more information about the new **Shepard's Immigration & Naturalization Citations.**

☐ I would like to order this citator. Please have your representative contact me with price and ordering information.

Name _____

Firm _____

Address _____

City _____ State _____ Zip _____

Area Code _____ Phone _____

Shepard's/McGraw-Hill
P.O. Box 1235
Colorado Springs, Colorado 80901
(303) 475-7230

SHEPARD'S McGRAW-HILL